Supreme Court, U. S.
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In the

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-608

RELIANCE INSURANCE COMPANY,
*Petitioner,*

VERSUS

DEBOER CONSTRUCTION, INC. and
THE INSURANCE CENTER, INC.,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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October, 1976

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No. _____

RELIANCE INSURANCE COMPANY,
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VERSUS

DEBOER CONSTRUCTION, INC. and
THE INSURANCE CENTER, INC.,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Reliance Insurance Company, respectfully petitions the Court for a writ of certiorari to review the opinion entered in this case by the United States Court of Appeals for the Tenth Circuit.

### (a) OPINIONS OF THE COURTS BELOW

The opinion of the Tenth Circuit Court of Appeals, yet unreported, is reproduced in Appendix A, pp. i-xvii. The petition for rehearing was filed on August 31, 1976, and was denied by order entered September 17, 1976. The order appears in Appendix B, pp. xvii-xix. There was no opinion in the trial court (U. S. District Court, Western District of Oklahoma, Honorable Luther Bohanon, presiding); however, the judgment is reproduced in Appendix C, pp. xx-xxi.

## (b) JURISDICTIONAL GROUNDS

(i) The opinion of the Tenth Circuit Court of Appeals was entered on August 18, 1976.

(ii) Petition for rehearing was filed on August 31, 1976, and the order denying it was entered on September 17, 1976. Motion for an order to stay mandate pending application for certiorari was filed on September 22, 1976, in the Circuit Court of Appeals, but has not yet been acted upon.

(iii) This petition is being filed less than ninety days following the date upon which the petition for rehearing was denied. The jurisdiction of this Court is invoked under authority of 28 U.S.C., §1254(1).

## (c) QUESTIONS PRESENTED

1. Under Oklahoma law, can a surety's attorney in fact, who has no actual authority to execute a construction bond in any amount without first obtaining the surety's permission, legally bind the surety to liability for any amount on a $925,000 penal amount contract performance bond when the power of attorney attached to the bond puts the bond obligee on notice that the attorney in fact is not authorized to execute any bond with penal amount in excess of $500,000?

(a) Can the partial validity doctrine of Restatement 2d of Agency, §164 (1958), be applied so as to render the bond valid up to $500,000 and remain consistent with Oklahoma statutes and decisional law?

(b) Can the partial validity doctrine be applied where the attorney in fact was acting in fraud of the



surety and was without either actual, implied or apparent authority to execute any bond, and remain consistent with Oklahoma statutes and decisional law?

2. Under the Oklahoma Statute of Frauds, is an oral promise to issue a construction contract payment bond, made by an attorney in fact for a surety to a proposed bond obligee, a valid or invalid promise to answer for the debt or default of another?

(a) Can the oral promise be taken out of the Statute of Frauds by partial performance on the part of the proposed obligee?

(b) Will consideration running from the proposed obligee to the proposed principal suffice for partial performance where the surety which is sought to be charged with liability does not receive the consideration or any benefit therefrom?

(c) Is the oral promise enforceable in any event where the attorney in fact did not have either actual, implied or apparent authority of the surety to make it?

3. Under Oklahoma law, is a corporate independent insurance agency liable to indemnify a surety which it represents for liability imposed upon the surety by reason of dishonest and unauthorized acts of an agency officer?

(a) Does issuance by the surety to the agency officer of a power of attorney relieve the agency of its obligation to indemnify the surety for losses sustained by it because of unauthorized risks created by the attorney in fact/agency officer?

(b) Where the agency agreement provides that the agency's authority to solicit and submit to the surety applications for bonds shall be set forth in the powers of attorney and letters of limitation to be issued to agency officer or employees, is the agency bound by the authority limitations, or has the agency fulfilled its obligations to the surety by simply requesting and securing from the surety powers of attorney for its officers or employees?

4. Does this petition present significantly important questions of state law which justify granting writ of certiorari for the purpose of thereafter certifying them to the Supreme Court of Oklahoma for answer?

## (d) STATUTORY PROVISIONS INVOLVED

**Title 25, Okla. Stat. §13 (1971), p. 2138, Vol. 2**

**Circumstances putting one on inquiry deemed constructive notice**

Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself.

**Title 15, Okla. Stat. §136 (1971), p. 1376, Vol. 1**

**Statute of frauds**

The following contracts are invalid, unless the same, or some note or memorandum thereof, be in writing and subscribed by the party to be charged, or by his agent:

* * * * * *



2. A special promise to answer for the debt, default or miscarriage of another, except in the cases provided for in the article on guaranty.

**Title 15, Okla. Stat. §321 (1971), p. 1391, Vol. 1**

**Guaranty defined**

A guaranty is a promise to answer for the debt, default or miscarriage of another person.

**Title 15, Okla. Stat. §424 (1971), p. 1396, Vol. 1**

**Agents' acts covered by indemnity agreements**

An agreement to indemnify against the acts of a certain person, applies not only to his acts and their consequences, but also to those of his agents.

## (e) STATEMENT OF THE CASE

**Jurisdiction of the Trial Court**

The jurisdiction of the trial court (U.S.D.C., W.D. of Oklahoma) was based upon diversity of citizenship under 28 U.S.C., §1332. DeBoer Construction, Inc., a Kansas corporation (hereafter "DeBoer"), brought action as plaintiff against Reliance Insurance Company, a Pennsylvania corporation (hereafter "Reliance"), The Insurance Center, Inc., an Oklahoma corporation (hereafter "Insurance Center"), Bruce Development Corp., an Oklahoma corporation (hereafter "Bruce Dev."), and Wayne Bruce (hereafter "Bruce"), seeking judgment in an amount far in excess of $10,000.

**Basic Facts**

There existed for a number of years an agreement between Insurance Center, an independent insurance agency in Oklahoma City, and Reliance, a commercial insurance and surety company, under which Insurance Center marketed or sold to its customers insurance policies and bonds when authorized to do so by Reliance. Both the agency agreement and the parties contemplated that Reliance would issue to selected Insurance Center employees powers of attorney so that they might conduct agency surety bond business by issuing for its customers, when authorized by Reliance, various bonds naming Reliance as surety and the customers as principal.

Insurance Center employed Dennis Winfrey and thereafter requested Reliance to issue him powers of attorney. Reliance, believing Winfrey to be competent and honest, issued to him, as attorney in fact, a power of attorney which limited Winfrey to executing surety bonds in penal amounts of $500,000 or less. Accompanying the power of attorney were explicit instructions to the effect that Winfrey was not authorized to execute any construction bond without first submitting the proposal to and obtaining the consent of Reliance.

Many months thereafter Winfrey became acquainted with Bruce, owner of Bruce Dev., a carpentry subcontractor which was financially incapable of securing legitimate construction bonds covering anticipated contracts. Winfrey made several unsuccessful attempts to find a company which would agree to act as surety for Bruce Dev. Winfrey did not, however, request that Reliance act as Bruce's



surety. Being unsuccessful in obtaining legitimate bonds, Winfrey and Bruce apparently decided that what some surety company, Insurance Center and proposed bond obligee did not know would not hurt them. It was then that Winfrey and Bruce set upon a course of conduct whereby Winfrey would furnish Bruce with blank bond forms and his Reliance powers of attorney to attach to them, knowing well that either Bruce or his wife would fill out the bond forms, sign his (Winfrey's) name to the bond as attorney in fact for Reliance, attach one of his powers and deliver the same to the proposed obligee.

Bonds covering two contracts were issued in this matter naming obligees other than DeBoer. Still other bonds were issued with DeBoer as obligee covering a subcontract on a construction project known as Pheasant Run, not the one that is the subject matter of this litigation. All of these bonds had penal amounts of less than $500,000. Winfrey never sought the authority of Reliance to issue the bonds, never reported them to either Insurance Center or Reliance and never collected or paid any premiums to Insurance Center for the account of Reliance. Conversely, Bruce surreptitiously paid Winfrey for his participation in the scheme and Winfrey used the funds for his personal benefit. Bruce, quite obviously, was fully aware of the dishonest scheme. Both Insurance Center and Reliance were completely unaware of the activities of Bruce and Winfrey.

Thereafter, Bruce was successful in negotiating with DeBoer a carpentry subcontract on an apartment house project in Peoria, Illinois, known as Seven Oaks, for which DeBoer was the general or prime contractor. This project is

the one involved in litigation. After DeBoer and Bruce settled upon a $925,000 subcontract price, Bruce and Winfrey caused to be executed another bogus performance bond by the very same methods they had employed in the past, all without the knowledge, consent or authority of either Insurance Center or Reliance. The performance bond had a penal amount of $925,000, named Reliance as surety, Bruce Dev. as principal and DeBoer as obligee, and was delivered to DeBoer with Winfrey's $500,000 limited power of attorney attached.

DeBoer officers and employees testified (and the trial court found) that they received the bonds delivered to them by Bruce on both projects (Pheasant Run and Seven Oaks) and looked them over but did not read the power of attorney to determine if Winfrey possessed the power to sign them on behalf of Reliance. DeBoer's vice president did admit, however, that he knew Winfrey's authority was defined in the power, that he should have read it and that attorneys in fact most always have some limitation upon their authority. Had the DeBoer officer read the power he would have learned that Winfrey had no authority with a $500,000 power to execute the $925,000 Seven Oaks bond.

Except for the misrepresentations made by Winfrey and the power of attorney itself, no representations of authority were made to DeBoer. DeBoer relied wholly upon statements made by Winfrey as to his authority.

In addition to the unread power of attorney attached to the bonds previously received by DeBoer on the Pheasant Run project, and prior to Bruce performing any work on the Seven Oaks project, DeBoer had notice of other facts



which should have provoked an inquiry into the ability of Bruce to obtain legitimate construction bonds, including a direct warning from a bank officer of the interim lender on the Pheasant Run project to the effect that Bruce was a perfidious and unsavory character who could not be trusted. Despite these notices and warnings, DeBoer never read the power of attorney attached to the Seven Oaks bond or made inquiry of Reliance or Insurance Center as to the authority of Winfrey to issue the $925,000 bond with a $500,00 limited power of attorney.

The inevitable occurred in the latter part of July, 1970, when DeBoer became concerned with the performance of Bruce Dev. and telephoned the Philadelphia home office of Reliance to determine if it had on record the Seven Oaks and Pheasant Run subcontract bonds. Reliance, of course, had no record of the bonds because they were neither authorized nor reported. An investigation was initiated immediately and Winfrey eventually disclosed all the bogus and unauthorized bonds, at least so far as has been determined to date.

With respect to the Seven Oaks bond which had a penal amount of $925,000, far in excess of the $500,000 limited power of attorney attached to it, Reliance denied liability to DeBoer on the theory that Winfrey was completely without any authority, either express, implied or apparent, to execute the bond because the power served as notice to DeBoer that Winfrey was exceeding even the "apparent authority" which might have been created by the power had DeBoer read it and had the bond been for $500,000 or less. In short, Reliance concluded that DeBoer

legally could not have relied to its detriment upon the insufficient power of attorney.

DeBoer advanced numerous theories of liability in the trial court, including a contention that Winfrey committed Reliance to an oral payment bond, and sought judgment for the loss it claimed to have suffered in completing the subcontract obligations of Bruce Dev. Following a trial on the merits, judgment was rendered in favor of DeBoer and against all defendants for $729,235.44. The trial court relied upon numerous theories advanced by DeBoer, including one alternative theory. Reliance was granted judgment over for indemnity against Insurance Center, employer of Winfrey.

On appeal the Circuit Court rejected the liability theories of apparent authority,[1] fraud, negligence, estoppel, waiver and ratification as against both Reliance and Insurance Center. Moreover, DeBoer's judgment against Insurance Center was vacated, as was Reliance's judgment over against Insurance Center. The $1 award of punitive damages against Reliance was likewise vacated.

The Court of Appeals affirmed the judgment against Reliance on the performance bond after reducing the award to $446,350.06, and also affirmed the alternative judgment against Reliance for $79,235.44, which was based upon the theory that Winfrey orally promised DeBoer to issue a labor and material payment bond.

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[1] To the extent that Winfrey could execute a $925,000 performance bond, as opposed to one for $500,000 or less.



Writ of certiorari is sought to review the holdings of the Circuit Court to the effect that (a) the completely unauthorized and bogus performance bond is binding upon Reliance up to $500,000; (b) partial performance (which did not exist) took the oral promise of Winfrey to execute a payment bond out of the Oklahoma Statute of Frauds; and (c) that Reliance, if liable to DeBoer, was not entitled to judgment for indemnity against Insurance Center, employer of the culprit, Winfrey, and the party with whom Reliance had the insurance agency agreement.

## REASONS FOR GRANTING THE WRIT

The Court of Appeals has either affirmed or created rules of law which are contrary to both the statutory and case law of Oklahoma and, in the opinion of Reliance, contrary to the case law of all the sister states. The questions presented for review are vitally important not only to Reliance but to the entire commercial surety industry which serves as the financial stabilizer of the construction industry. The resolution of these questions will directly affect the marketing system employed by commercial sureties almost from their very inception. Also directly and adversely affected will be other industries and professions which utilize powers of attorneys in conducting commercial transactions, not to mention use of powers by trusts and individual citizens.

Powers of attorney are necessary and proper tools of commerce, and traditionally the authority contained in powers has been strictly construed and not enlarged by court construction. A different rule would not only deter

men from even delegating powers to others, and thus retard factors and agencies in commerce, but would vest a most dangerous discretion in the courts to vary the agreements of parties.

As applied in this case, one rule adopted by the lower courts, which never before existed, has the effect of enlarging the authority granted in a power of attorney and letters of limitation so as to vary the agreement of the parties.

The second rule creates a new exception to the Oklahoma Statute of Frauds which declares "invalid" oral agreements to answer for the debt, default or miscarriage of another.

The third rule adopted by the lower courts has the effect of relieving a corporate insurance agency from liability for the acts of its officers and employees who, by exceeding their authority, impose liability upon insurance underwriters represented by the agency. This rule is in direct conflict with well-settled principles of agency law.

The basic reason given by the Court of Appeals for adopting these rules was the "apparent lack of controlling authority" and the desire to defer to the judgment of the resident district judge. Reliance respectfully submits that these rules constitute such a severe departure from well-established business practices and procedures, based upon equally long-standing legal principles, that this Court should grant the requested writ and either reverse the lower courts or certify these critical and important legal questions to the Supreme Court of Oklahoma under applicable statutes. Any radical change of state law should be



determined by the highest court of that state, not by a Federal District Court or even a U. S. Court of Appeals which simply defers to the opinion and judgment of the trial court.

Both the trial court and the Court of Appeals misapplied existing Oklahoma authorities, both statutory and decisional, as hereafter explained.

### The Lower Court Misapplied the Partial Validity Exception Doctrine of Restatement 2d, Agency, §164 (1958), Contrary to Oklahoma Law

The Court of Appeals acknowledged that Winfrey was without actual or express authority to issue any bond without first obtaining approval of Reliance. Thus, the question became whether or not Winfrey had apparent authority from DeBoer's viewpoint to issue the $925,000 performance bond.

Apparent authority is that which an agent appears to have by reason of some act or representation by the principal himself.[2] The prerequisites to establish apparent authority are: (1) representations by the principal that the agent has authority; (2) knowledge of the representations and good faith reliance thereon by the third party; and (3) a change of position to his detriment and loss by the third party.[3] Reliance made no representations to DeBoer not set forth in the power of attorney. DeBoer did not read the power and rely upon it. DeBoer relied wholly upon the

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[2] 3 Am.Jur.2d, *Agency*, §§73-76, pp. 475-480.

[3] *Institute of Business Planning, Inc.* v. *Standard Life & Acc. Ins. Co.*, 242 F.Supp. 100 (W.D. Okl. 1965); *Rosser-Moon Furniture Co.* v. *Oklahoma State Bank*, 135 P.2d 336 (Okl. 1943).

representations of the attorney in fact, Winfrey, which under the law are insufficient to establish any authority whatsoever.[4]

Moreover, a person who deals with an agent knowing that he is acting under a power of attorney is bound to ascertain and know the character and extent of his authority under the power.[5] The principle is statutory in Oklahoma.[6] The Court of Appeals acknowledged that ". . . The evidence falls squarely within the rule stated and DeBoer cannot escape its effect by relying on indicia of a greater apparent authority," and that knowledge "that an agent has limited authority defeats any right to rely on apparent authority."[7]

Had DeBoer read the power of attorney, as the settled law of Oklahoma requires, it would have learned that Winfrey could not execute a $925,000 penal amount bond and would or should have rejected it as improper and

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[4] *American National Bank* v. *Bartlett*, 40 F.2d 21 (10 Cir. Okl. 1930); *S. S. Silberblatt, Inc.* v *Seaboard Surety Co.*, 417 F.2d 1043 (8 Cir. 1969); 3 Am.Jur.2d, *Agency*, §74, p. 476.

[5] 3 Am.Jur.2d, *Agency*, §81 (1962); Restatement 2d of Agency, §167 (1958); *Stovall* v. *Commonwealth*, 4 S.E. 379 (Va.App. 1887); *Dugan* v. *Champion Coal & Towboat*, 49 S.W. 958 (Ct.App.Ky. 1899); *Barrett Co.* v. *Globe Indem. Co.*, 159 Atl. 709 (N.J. 1932); *Schenker* v. *Indemnity Ins. Co. of N. Am.*, 340 Pa. 81, 16 A.2d 304 (S.Ct 1940); *Sharpstown State Bank* v. *Great American Ins. Co.*, 441 S.W.2d 548 (Tex.Civ.App. 1969); *American Surety Co. of N. Y.* v. *Cross*, 80 S.W.2d 470 (Tex.Civ.App. 1935); *Indemnity Ins. Co. of N. Am.* v *Lane Contracting Corp.*, 227 F.Supp. 143 (D.C. Neb. 1964).

[6] Title 25, Oklahoma Statutes, §13 (1971). See Statutory Provisions, *supra*, for text.

[7] Appendix A, p. v. See: *Mid-Continent Petroleum Corp.* v. *Wilhoit*, 270 P.2d 645 (Okl. 1954); *F.D.I.C.* v. *Grim*, 86 P.2d 774 (Okl. 1938).



demanded that Bruce Dev. furnish a valid bond. At a minimum, a reading of the power demanded that DeBoer inquire of Reliance as to Winfrey's actual authority.[8] Such an inquiry would have disclosed the complete absence of authority to issue a bond for any amount.

Therefore, not having read the power, so far as DeBoer was concerned Winfrey had no authority whatsoever. Other cases with almost identical facts have denied the obligee on unauthorized bonds any relief.[9] Failure to read the power is the same as if no power had been attached, and relief is likewise denied.[10]

Up to this point the Court of Appeals did not disagree with the legal position taken by Reliance. However, to sustain its conclusion that the bogus bond was valid up to $500,000, the lower court reasoned that because factually this was a case of first impression in Oklahoma, great deference should be given to the opinion of the resident district judge.[11]

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[8] *DeWeese* v. *Baker-Kemp Land Trust Corp.*, 102 P.2d 884 (Okl. 1940). A person is deemed to know what an inquiry might reveal. Failure to make inquiry has been characterized as a species of fraud. 58 Am.Jur.2d, *Notice*, §8, p. 491.

[9] *Stovall* v. *Commonwealth*, 4 S.E. 379 (Va.App. 1887); *Dugan* v. *Champion Coal & Towboat*, 49 S.W. 958 (Ct.App.Ky. 1899).

[10] *Barrett Co.* v. *Globe Indemnity Co.*, 159 Atl. 709 (N.J. 1932); *S. S. Silberblatt, Inc.* v. *Seaboard Surety Co.*, 417 F.2d 1043 (8 Cir. 1969); *Schenker* v. *Indemnity Ins. Co of N. Am.*, 340 Pa. 81, 16 A.2d 304 (S.Ct. 1940); *American Surety Co. of N. Y.* v. *Cross*, 80 S.W.2d 470 (Tex.Civ.App. 1935).

[11] Appendix A, p. ix. Reliance does not agree that it is truly a case of first impression. Admittedly, the precise facts involved have not been before the Oklahoma Supreme Court, but that Court has adopted rules of law which have been applied to similar factual situations which do not differ in principle.

The lower court based its reasoning upon an erroneous premise—that Winfrey had authority to issue bonds with penal amounts up to $500,000. Although Winfrey was given a power to attach to bonds issued by him to evidence his "apparent" authority to third persons, he was instructed in writing that he was not authorized to issue any construction bond without first obtaining approval from Reliance.[12] Thus, there was no actual or implied authority and there was no "apparent" authority because DeBoer did not read and rely to its detriment upon the power. Nevertheless, the lower court noted that The American Law Institute had recognized the problem but had not attempted to state a rule, citing Restatement 2d of Agency, §164(2) (1958), as follows:

> "Where the only difference between the contract as authorized and the contract as made is a difference as to amount, or the inclusion or exclusion of a separable part, the principal is liable upon the contract as it was authorized to be made, provided that the other party seasonably manifests his willingness to accept the contract as it was authorized."

This statement is followed by the caveat that the rule does not include the situation in which the agent is also acting in fraud of the principal, as to which no statement of law was made. The trial court specifically found that Winfrey was acting in fraud of Reliance and Insurance Center as well as DeBoer.

The Court of Appeals acknowledged that in jurisdictions other than Oklahoma the partial validity rule set forth

[12]Appendix A, p. ii.



in §164(2) had been recognized,[13] but rejected Reliance's argument that all of those decisions involved situations where the agent had actual or express authority to bind the principal.

It was then reasoned that if a principal may ratify a contract made in excess of an agent's authority, then the third person should be able to accept a contract for a lesser amount as originally authorized by the principal. Again, the premise is invalid. Winfrey had no original authority.

The fairness of the partial validity doctrine is justified by the lower court with the statement that the principal need not be given the option of avoiding, by failing to ratify, the very contract the principal intended the agent to make simply because of the agent's mistaken exercise of authority. Again, Reliance did not authorize or intend for Winfrey to issue any bond without its permission. Winfrey made no mistake. He intended to and did commit fraud.

Next the lower court reasoned that applying the partial validity doctrine in this case—despite the caveat of Restatement 2d that it was inapplicable to fraudulently created agreements—would not be at odds with the rule requiring a person dealing with an attorney in fact to read the power to ascertain his apparent authority and, if circumstances dictate, ascertain the attorney's actual authority from the principal. The Court readily acknowledges that

[13]The rule is statutory in Oklahoma with respect to powers of attorney authorizing the disposition of real property. Title 60, Oklahoma Statutes, §236 (1971). Had the Oklahoma Legislature intended the rule to apply to other situations it would have adopted similar statutes. It didn't.

the purpose of the rule imposing a duty to read a power and make inquiry was to prevent fraud by the agent.

The next step in reasoning was that the incentive to ascertain the authority of agents would not be diminished because the person dealing with them would still be subjected to possible loss when the agent fraudulently exceeds his authority. In summary, the Court of Appeals concluded that dividing the responsibility in the event of loss could encourage both parties to exercise greater prudence. The responsibility the courts below imposed upon Reliance was to supervise its attorneys in fact so as to protect the public from loss should the attorneys in fact fraudulently execute contracts in excess of their authority.[14] Oklahoma has not adopted such a rule, and it is very unlikely that it would do so in this type situation because the very purpose of a power of attorney is to permit the attorney in fact to act in the absence of the principal. Moreover, no amount of supervision can prevent dishonesty.

The very purpose for the rule requiring third parties to ascertain the actual or apparent authority of special agents (attorneys in fact) is to prevent fraudulent and unauthorized contracts of which the principal has no knowledge or method of preventing short of having someone accompany the special agent every moment. The rule places the burden squarely upon the only person capable of protecting himself and preventing the fraudulent or unauthorized act—the third party who is dealing with the agent. The rule adopted by the Court of Appeals completely re-

[14]The Court cites *Gilmore* v. *Constitutional Life Ins. Co.*, 502 F.2d 1344 (10 Cir. 1974), which neither involved Oklahoma law nor similar facts.



lieves the third party of the duty to ascertain the agent's authority—even when the third person knows or is charged with constructive knowledge that the agent is exceeding his authority. DeBoer did not fulfill any of its legal obligations and the Court of Appeals so acknowledged—even to the point of characterizing its failure as contributory negligence.

The factual situation now before the Court cannot be likened to a case in which an agent has actual or expressed authority up to a certain amount, and the third party is unaware, actually or constructively, that the agent is exceeding his authority. In those situations in which the partial validity doctrine is applied the agent possesses actual authority to act, and it is not unjust to permit the third party to accept the authorized portion and, likewise, permit the principal to reject the unauthorized portion.

Restatement 2d of Agency, §166, demonstrates the point by providing that a ". . . person with notice of limitation on the agent's authority cannot subject the principal to liability upon a transaction with the agent if he should know that the agent is acting improperly. . . ." DeBoer should have known Winfrey was acting improperly—the power was there for the reading. Should DeBoer's failure to exercise its duty under Oklahoma law permit it to plead ignorance or negligence and subject Reliance to liability for any amount? The answer should be no!

A careful reading of §164, *supra*, reveals that there are several prerequisites to its application. First, it does not apply to situations in which the agent is acting in fraud of his principal—the caveat so states. Secondly, it applies only

where the third party is unaware that the agent is exceeding his authority—§166, *supra*, says that the third party cannot subject the principal to liability when he should know the agent is acting improperly.[15] Thirdly, the contract (bond) must be partially authorized—there was no authority, actual or apparent. Comment a. of §164, in explaining the rationale of the partial validity doctrine, states that it subjects the principal to liability ". . . only in accordance with his *expressed intent* and before he has changed his position"[16] (emphasis added). There was no expressed intent or authority. Fourthly, the third party, DeBoer, must ". . . seasonably manifest its willingness to accept the contract as authorized." DeBoer did not do so—it received the bond shortly after March 12, 1970, but did not contact Reliance until July 29, 1970. In fact, DeBoer never manifested its willingness to accept a bond with a penal amount of $500,000 or less, but continued throughout the trial and appeal to contend that the bond was valid for $925,000.

The difference was not only one of amount. The testimony was that the amount and type of contract, not the bond, and the ability, financial worth and personal integrity of the bond principal (contractor) determines the risk of loss attendant to a construction bond. The $925,000 contract cannot be separated from the risk assumed under a performance bond simply by reducing the bond penalty to conform to limits set forth in a power of attorney. The risk

[15]See: *Home Owners Loan Corp.* v. *Thornburgh*, 106 P.2d 511 (Okl. 1940).

[16]The position of Reliance changed to its detriment because the work was well underway and thousands of dollars had been paid Bruce Dev. before Reliance ever learned of the bogus bond.



is the same regardless of the penal amount of the bond, although the loss of the surety is limited to the penal amount in the event of default. In applying the partial validity doctrine the lower courts have materially changed the contract (bond) made by the dishonest agent so as to give the power of attorney an "appearance" of authority, all after the fact. In summary, the rule employed by the Court of Appeals has the effect of permitting the courts to alter or reform contracts so as to authorize their execution, and thus relieve a third party from his duty to ascertain the authority of a special agent.

Although the Court of Appeals professed to be dividing the responsibility by the adoption of the new rule, in reality it imposed all of the loss upon Reliance. The lower court's reasoning could be used to argue that DeBoer should suffer the first $425,000 in loss ($925,000 minus $500,000) and Reliance the next $500,000. In both cases the reasoning is unsound. Admittedly, had the bond originally provided for a penal amount of $500,000 or less, and had DeBoer read and relied to its detriment and loss upon the "apparent" authority the power represented without any knowledge, actual or constructive, that Winfrey was acting improperly, then Reliance would have been liable under applicable principles of law and would have confessed liability as it did on the Pheasant Run project. However, those facts did not exist and the Court should not alter them by changing the amount of the bond to conform to the limits of apparent authority set forth in the power.

In summary, the opinion of the Court of Appeals is contrary to established Oklahoma law, and sets a dangerous precedent which could have a very adverse effect on the

long-standing commercial surety bond marketing system, as well as upon individuals, trusts and others who use powers of attorney in conducting business and personal affairs.

This Court should grant the writ and reverse the opinion and judgment of the lower courts or grant the writ and certify the questions to the Supreme Court of Oklahoma under Title 20, Oklahoma Statutes, §§ 1601, *et seq.* (Supp. 1973) (reproduced in Appendix D).

**The Oral Promise to Execute a Payment Bond Was Invalid Under Oklahoma Statute**

The trial court found that Winfrey verbally promised DeBoer that he would secure on behalf of Bruce Dev. a separate payment bond[17] covering the Seven Oaks subcontract but failed to do so. There was no evidence as to the penal amount of the promised bond or that Reliance would be the surety, as opposed to some other surety represented by Insurance Center for which Winfrey held a power of attorney. The Court of Appeals affirmed an alternative trial court finding of an oral payment bond and the resulting judgment against Reliance for $79,235.44, the amount of job bills of Bruce Dev. which DeBoer claims it was forced to pay but which should have been paid by Reliance had a payment bond been issued.

The reason given for affirming the trial court was that there had been partial performance sufficient to remove the oral promise from the Oklahoma Statute of Frauds. The statute [Title 15, Oklahoma Statutes, §136 (1971)]

[17]In addition to the bogus but written performance bond.



renders "invalid" oral promises to answer for the debt, default or miscarriage of another. Construction bonds are such contracts.[18] The Oklahoma Supreme Court has held that, as distinguished from an agreement of indemnity, a suretyship agreement is a promise to one to whom another is answerable—an agreement to answer for the debt, default or miscarriage of another.[19] Assuming, as we must and as did the Court of Appeals, that a promise to issue a payment bond falls within the Statute of Frauds, the question becomes whether or not there was anything to take the promise out of the statute and render it enforceable, as opposed to "invalid."

The partial performance relied upon by both the trial court and the Court of Appeals was DeBoer's argument that a progressive subcontract payment made to Bruce Dev. included funds for reimbursement of bond premiums which Bruce Dev. represented it had or would have to pay. There was no evidence that Reliance or Insurance Center

[18]*In the Matter of the Estate of Bollerut (Otto Gas, Inc.)* v. *Stewart*, 69 N.W.2d 945 (Neb. 1965); *Standard Acc. Ins. Co.* v. *Simpson*, 64 F.2d 583 (4 Cir. 1933); *Everly* v. *Equitable Surety Co.*, 190 Ind. 274, 130 N.E. 227; *Commonwealth* v. *Hinson*, 143 Ky. 428, 136 S.W. 912; *National Materials Co.* v. *Guest*, 147 So. 771; *Williams* v *Breazeale-Hyams Motors*, 16 La.App. 291, 134 So. 330; *Fellows Box Co.* v. *Mills*, 86 N.H. 267, 167 Atl. 153; *Horning* v. *Fidelity & Deposit Co. of Md.*, 35 N.E.2d 978; *Craswell* v. *Biggs*, 160 Ore. 547, 86 P.2d 71; *Peters* v. *Bechdolt*, 100 Ind.App. 395, 192 N.E. 116; *Amelco Window Corp.* v. *Federal Ins. Co.*, 127 N.J. Super. 342, 317 A.2d 398 (1974). See also 9 Appleman on Insurance, §5338, p. 172.

[19]*Oppenheim* v. *National Surety Co.*, 231 Pac. 1076 (Okl. 1925). Oklahoma statute defines "guaranty" as a promise to answer for the debt, default or miscarriage of another. Title 15, Oklahoma Statutes §321 (1971). See also *American Casualty Co.* v. *Devine*, 157 So.2d 661 (Ala. 1963), wherein the Court held that a payment bond fell within the Statute of Frauds.

received anything. Conversely, the evidence was that by prearrangement Bruce paid Winfrey for his participation in the dishonest scheme and that the latter used the funds for his personal benefit. Assuming for the purpose of argument only that Winfrey had authority to make the oral promise,[20] where was the partial performance which would take the promise out of the statute? The bond was never issued as promised and premiums were never paid directly or indirectly to the person sought to be charged with liability.[21]

While recognizing that payment alone is not sufficient to take oral contracts involving interests in land out of the statute under Oklahoma law[22] and that the "part performance" doctrine does not normally apply to promises to answer for the debt or default of another,[23] the Court of Appeals held that there had been part performance (DeBoer paying Bruce Dev. under the subcontract) and that the oral promise was taken out of the Statute of Frauds. The apparent lack of controlling Oklahoma authority was

[20]In *Schenker* v. *Indemnity Ins. Co. of N. Am.*, 340 Pa. 81, 16 A.2d 304 (S.Ct 1940), the Court refused to bind a surety to an oral promise made by an attorney in fact to issue a contract bond which he could not have issued in writing under authority of the power of attorney and the authority instructions issued by the surety.

[21]The Court of Appeals relied upon 37 C.J.S., *Frauds, Statute of*, §253 (1943), which says the party sought to be charged must receive the benefit of the performance by the other party.

[22]Appendix A, p. xii; see also *Sarber* v. *Harris*, 368 P.2d 93 (Okl. (1962); *Hickey* v. *Ross*, 172 P.2d 771 (Okl. 1946); *Fry* v. *Penn. Mutual Life Ins. Co.*, 159 P.2d 550 (Okl. 1945); and *Nichols* v. *Edmundson*, 232 P.2d 68 (Okl. 1924).

[23]Appendix A, p. xiii. 37 C.J.S., *Frauds, Statute of*, §253 (1943); 73 Am.Jur.2d, *Statute of Frauds*, §468 (1974).



the reason given for affirming the trial court.[24] None of the cases or treatises mentioned or cited either by the Court of Appeals or DeBoer in its brief stands for the proposition that partial performance of an oral promise to answer for the debt or default of another is sufficient to overcome the statutory mandate of invalidity. The reason for the lack of any such authority is the simple fact that were the doctrine applied to such contracts the Statute of Frauds would not serve its intended purpose—to eliminate the possibility of fraud arising from perjured testimony concerning alleged oral agreements.[25]

Admittedly, Oklahoma follows the general rule that a "fully executed" oral promise to answer for the debt, default or miscarriage of another is not invalid.[26] Winfrey's alleged promise was not partially or fully executed. No premiums were paid to Reliance or Insurance Center and no written bond was executed. DeBoer paid funds to Bruce Dev. and no one else. Although the Oklahoma Supreme Court has never passed directly upon identical facts, it has held that part performance is insufficient to render valid oral contracts not to be performed within one year.[27] The

[24]Appendix A, p. xiii.

[25]37 C.J.S., *Frauds, Statute of*, §1 (1943).

[26]*McEwen* v. *Vallentine*, 170 Pac. 490 (Okl. 1918).

[27]*Dicks* v. *Clarence L. Boyd Co., Inc.*, 238 P.2d 315 (Okl. 1951); *St. Louis Trading Co.* v *Barr*, 32 P.2d 393 (Okl. 1934). Oklahoma has applied the partial performance doctrine only to real estate transactions [*Stinchcomb* v. *Stinchcomb*, 246 P.2d 727 (Okl. 1952); *Harris* v. *Arthur*, 127 Pac. 695 (Okl. 1912)], and to sale of personal property transactions which were made subject to the doctrine by statutory language [see Title 15, Oklahoma Statutes, §136(4), now repealed and replaced by Title 12A, Oklahoma Statutes, §§2-201 (Uniform Commercial Code)].

situations are similar and analogous. Neither case involves evidence and testimony which can be conclusively free of the possible fraud the statute was designed to prevent. The authorities across the nation appear to be unanimous that part performance is insufficient to take an oral promise to answer for the debt or default of another out of the Statute of Frauds,[28] and there is no reason to surmise or conclude that the Oklahoma Supreme Court might hold otherwise.

The danger of the precedent created by the Circuit Court's opinion is readily apparent. Under the rule created by the opinion, it would be possible for one or more persons to fraudulently impose liability upon an innocent third party, whether commercial surety or otherwise, simply by committing perjury. An aspiring but dishonest obligee or creditor would need only falsely testify that an oral promise was made by one person (surety or guarantor) and that consideration was paid to still another person (the debtor), and the very fraud which the statute was designed to prevent would be perfected assuming, of course, that the perjured testimony were believed.

If the opinion of the Court of Appeals is allowed to stand as precedent for Oklahoma law, many frauds may be perpetrated before the Supreme Court of Oklahoma has an opportunity to pass upon the question. In fact, a fraud which the statute was designed to avoid may have been perpetrated in this case. The statute places the burden upon the person who intends to rely on the promise to get it

[28]37 C.J.S., *Frauds, Statute of*, §253 (1943); 73 Am.Jur.2d, *Statute of Frauds*, §468 (1974), and cases cited therein.



reduced to writing and signed by the party sought to be charged. DeBoer failed to do so, just as it failed to read the power of attorney. The Court of Appeals, in essence, has shifted the burden to Reliance, even though there was no evidence that Winfrey promised, either orally or in writing, that Reliance would be the surety on the proposed payment bond which was never issued.

It is respectfully submitted that a writ of certiorari should be granted on this issue, and that this Court either reverse the holding of the Court of Appeals or, at a minimum, certify the question to the Oklahoma Supreme Court for an answer of what the Oklahoma law is or should be. Certification of legal questions can be accomplished under Oklahoma's Certification of Questions of Law Act, Title 20, Oklahoma Statutes, §§ 1601 *et seq.* (Supp. 1973) (pertinent portions reproduced in Appendix D).

**Reliance Was Entitled to Indemnity From Insurance Center**

The Court of Appeals vacated the judgment of Reliance for indemnity against Insurance Center. The trial court judgment was not supported by findings and conclusions, although appropriate ones were tendered by Reliance. This failure was brought to the attention of the Court of Appeals. However, the judgment was vacated by the Court of Appeals not because of the lack of findings and conclusions, but because the Court of Appeals determined that a relationship separate and apart from the agency agreement between Reliance and Insurance Center was created when Reliance issued powers of attorney to Winfrey. In short, the Court of Appeals held that Insurance Center was not

responsible for the dishonest acts of its officer, Winfrey, which imposed liability upon Reliance.

The relationship between Reliance and Insurance Center was not unusual. It was the typical relationship which exists between an insurance carrier and an independent insurance agency. Insurance Center, being a corporation, operates its agency business through officers and employees. Insurance Center requested that Reliance issue powers of attorney to Winfrey so that he might conduct agency bond business. The agreement between Reliance and Insurance Center provides in pertinent part: "The Agent [Insurance Center] is hereby granted authority to solicit and submit applications for surety bonds; . . . in the case of bonds such authorization to be set forth in Powers of Attorney and Letters of Limitation; . . ." The agreement also obligates "The Agent" to pay over all premiums shortly following the month in which policies and bonds are issued. Insurance Center's president testified that the agency agreement contemplated that powers of attorney were to be issued to agency employees who handled bond matters. The "Letters of Limitation" delivered to Winfrey stated, in pertinent part, that writing unauthorized risks ". . . may subject you personally and the agency to full responsibility. . . ."

The Court of Appeals, in construing the agency agreement, determined that Insurance Center's only obligation to Reliance was to secure from it for selected agency employees powers of attorney before allowing them to solicit and submit bond applictaions. The Court of Appeals apparently did not take into consideration the contract language: ". . . such authorization to be set forth in Powers of Attorney



*and Letters of Limitation* . . ." (emphasis added). It was, of course, the letters of limitation which specified that Winfrey could not issue any construction bond without prior approval of Reliance. Nevertheless, the Court of Appeals held that Insurance Center did not have to comply with the letters of limitation upon the theory that Reliance had entered into a completely separate agreement with Winfrey and was entitled to indemnity only from him. This narrow interpretation of the agency agreement completely ignores the language in the agreement that the ". . . authorization [is] to be set forth in Powers of Attorney and Letters of Limitation; . . ." Neither Reliance nor Insurance Center intended that there be a separate agency agreement with Winfrey; otherwise, provisions would have been made for him to collect premiums and retain commissions.

The Court of Appeals, in essence, has avoided application of the well-established doctrine that an agent who exceeds his authority owes an obligation of indemnity to his principal by concluding that Insurance Center was not Reliance's agent with respect to the dishonest acts of Winfrey.

The effect that this precedent would have on the insurance and bond marketing system which has been employed for many, many years is apparent. Corporate and individual insurance agencies would no longer be responsible for the unauthorized acts of their employees who are given specific limited authority at the request of the agent under the agency agreement. The conclusion of the Court of Appeals would appear to be gross error of law. Moreover, in reaching this conclusion the Court relied upon an erroneous find-

ing of the trial court to the effect that Winfrey ". . . had authority and the power to bind Reliance in all material respects in this action." There was absolutely no evidence to support this finding. The only authority given Winfrey was to submit to Reliance, through the insurance agency, applications for contract bonds, which would either be approved or disapproved by Reliance. Even the opinion by the Court of Appeals acknowledges that Winfrey was without authority to issue any bond without first obtaining approval from Reliance. This erroneous finding should not serve as a basis for relieving The Insurance Center from its obligation to indemnify Reliance against liability created by agency employees who exceed their authority.

In fairly construing the relationship under the agency agreement between Reliance and Insurance Center, it seems only proper to conclude that Insurance Center was, in fact and in law, the independent insurance agent of Reliance with certain limitations of authority. With respect to contract bonds, the authority was to be set forth and described in powers of attorney issued to agency employees and in the "Letters of Limitation" which accompanied the powers. The limitations did not and were not intended to apply solely to the individual employee to whom the power of attorney was issued, but applied to the corporate agency as well. The failure of Winfrey to observe the limitations was a failure of "The Agency" for which it should be liable over to Reliance.

The Court of Appeals did not find inapplicable the authorities cited by Reliance to the effect that an agent owes to its principal the duty of indemnity arising out of



liability created by his unauthorized acts or the acts of his employees.[29] The principle was well put by the Court of Claims in *Victory Carriers, Inc.* v. *United States*, 467 F.2d 1334, 1341 (Ct. Clms. 1972), as follows: ". . . It is well established that an agent is responsible to his principal for the actions of a sub-agent in handling the affairs of the principal which have been trusted to the sub-agent."

It is respectfully submitted that the Court of Appeals has completely misconstrued the relationship between Reliance and Insurance Center and the obligations owed by each to the other. Because of the drastic effect which the opinion of the Court of Appeals would have upon the insurance industry in Oklahoma—possibly nationwide—this Court should issue writ of certiorari, and reinstate the judgment entered by the trial court. Certification of the question of law to the Supreme Court of Oklahoma for an answer would be helpful even though the trial court did not enter specific findings and conclusions.

Of course, should the judgment in favor of DeBoer against Reliance be vacated, then the issue of indemnity becomes moot.

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[29]Annot., 35 A.L.R.3d 907, "Liability of Insurance Agent for Exposure of Insurer to Liability Because of Issuing Policy Beyond Authority or Contrary to Instructions." Counsel has been unable to find an Oklahoma decision directly in point. However, Title 15, Okla. Stat., §424, provides: "An agreement to indemnify against the acts of a certain person, applies not only to his acts and their consequences, but also to those of his agents." See also: Restatement 2d of Agency, §401: "An agent is subject to liability for loss caused to the principal by any breach of duty." Comment d. illustrates the principle. Restatement 2d of Agency, §406, provides that an agent is as responsible to the principal for the conduct of subservants and subagents as the agent is for his own conduct.

## CONCLUSION

Reliance respectfully requests the Court to grant writ of certiorari to review and reverse the opinion of the Court of Appeals and the judgment of the trial court.

The partial validity doctrine is inapplicable to the facts of this case and has never been adopted in Oklahoma. Its application has the effect of overruling established decisional law of Oklahoma as well as some statutes.

In giving validity to an oral promise to answer for the debt or default of another, the Court of Appeals has ruled contrary to an Oklahoma statute and, so far as Reliance can determine, has ruled contrary to the decisions of all the sister states which have passed upon the issue.

Although there are no Oklahoma decisions directly on point, the vacation of Reliance's judgment over against Insurance Center for indemnity would appear to be contrary to well-established general law.

Realizing that this Court, as most others, has a heavy work load, Reliance respectfully submits that in any event the writ should be granted so that the questions presented may be certified for answer to the Supreme Court of Oklahoma, the Court which should, if at all possible, decide critical questions of Oklahoma law. See Appendix D for the statutory authority for certifying questions.

Respectfully submitted,

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October, 1976

## APPENDIX A

PUBLISH

(filed August 18, 1976)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

| | | |
|---|---|---|
| DeBOER CONSTRUCTION, INC. | ) | |
| | ) | |
| Plaintiff-Appellee-Appellant, | ) | |
| | ) | |
| v. | ) | Numbers |
| | ) | 74-1581 |
| RELIANCE INSURANCE COMPANY | ) | 74-1582 |
| and THE INSURANCE CENTER, INC., | ) | 74-1583 |
| | ) | (Consolidated) |
| Defendants-Appellants-Appellees, | ) | |

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA (D. C. No. 71-252)

John B. Hayes, Oklahoma City, Oklahoma, for Defendant-Appellant-Appellee, Reliance Insurance Company.

William G. Smith (Edward L. Ray, on the brief), Oklahoma City, Oklahoma, for Defendant-Appellant-Appellee, The Insurance Center, Inc.

Brian G. Grace (John R. Stallings and Windell G. Snow, Wichita, Kansas, and William J. Ross, Oklahoma City, Oklahoma, on the brief), Oklahoma City, Oklahoma, for Plaintiff-Appellee-Appellant, DeBoer Construction, Inc.

Before BREITENSTEIN, HILL and BARRETT, United States Circuit Court Judges.

HILL, Circuit Judge.

This is an appeal from a judgment in three consolidated cases. As it comes to this Court, each party is an

appellant and an appellee. The litigation was first commenced by DeBoer Construction, Inc., after The Insurance Center, Inc., and Reliance Insurance Company denied liability on a construction contract surety bond fraudulently issued by their agent. The trial court gave judgment to DeBoer on several theories, including liability on the bond contract, negligent hiring and supervision of the agent, fraud, waiver of defenses, and estoppel to assert defenses. DeBoer was awarded $1.00 in punitive damages against Reliance. The trial court also gave Reliance a judgment for indemnity from Insurance Center. Each of the judgments is put in issue on appeal. We affirm in part and reverse in part. First, we will state the facts.

Insurance Center is an independent insurance agency doing business in Oklahoma City, Oklahoma. Reliance is an insurance company engaging in many types of insurance, including construction contract surety bonds. DeBoer is a construction company based in Wichita, Kansas. The perpetrator of the fraud in this case was one Gary Winfrey.* At the relevant times he was a general agent for Insurance Center in property and casualty insurance. He was also an assistant vice president of Insurance Center and manager of its bond department. Upon Insurance Center's request, he had been issued a power of attorney from Reliance authorizing him to execute construction bonds up to a maximum penal amount of $500,000. He was given instructions, however, not to write any bond without first obtaining approval from Reliance.

During 1969 and 1970, Winfrey engaged in a scheme with one Wayne Bruce to create several fraudulent bonds for Bruce's carpentry contracting company. Because of its financial condition, Bruce's company was unable to obtain legitimate bonds. Winfrey would provide bonds and appropriate the premiums, never notifying Insurance Center or

* Should be Dennis Winfrey



Reliance that bonds were being provided. Fraudulent bonds of this type were issued to DeBoer on two subcontracts with Bruce.

DeBoer's first contact wtih Winfrey was on an apartment complex in Oklahoma City known as Pheasant Run. Bruce was vying for a subcontract and introduced Winfrey as his bonding agent. Winfrey told DeBoer's representatives he could provide the necessary bonds. Bruce was awarded the subcontract in December 1969 and Winfrey later furnished separate payment and performance bonds. Winfrey's limited power of attorney was attached to both bonds. DeBoer officials testified they looked to see if a power of attorney was attached, but after seeing it was, they assumed everything was in order and did not read it in either case.

In March, 1970, Bruce and DeBoer entered into a carpentry subcontract, including labor and materials, for the construction of Seven Oaks apartment complex in Peoria, Illinois. During these negotiations, Winfrey represented that Bruce was bondable up to 10 or 11 million dollars. DeBoer was provided a performance bond in the penal amount of $925,000. Again the power of attorney limited to $500,000 was attached, but no one at DeBoer read it. A payment bond was promised by Winfrey, but was never delivered.

By July 1970, Bruce was in default on both projects. DeBoer's inquiry about collecting on the bonds led to the discovery of the fraud. A settlement was reached by which Reliance assumed liability on the Pheasant Run bonds which were within the $500,000 limit on Winfrey's authority. Liability was denied on the Seven Oaks bond, and this litigation ensued.

As we noted above, the trial court based its judgment on numerous theories.[1] Because of our disposition of the

[1] This case was complicated by the trial court's adoption of 250 findings of fact and 42 conclusions of law virtually verbatim from the proposals

case, we must consider each of them. We will attempt to do so in a logical order.

The first issue is whether Winfrey had apparent authority to bind Reliance on a $925,000 bond. On this issue we have the testimony of three DeBoer representatives—Jerry Gaddis, DeBoer's president; Jerry Andrews, DeBoer's vice president; and Raymond Slusser, DeBoer's field superintendent. Andrews and Slusser testified they never requested a meeting with Winfrey; Wayne Bruce brought him to a meeting and introduced him as his bonding agent. Gaddis testified no one at Insurance Center or Reliance ever represented to DeBoer that Winfrey was representing them. DeBoer representatives had visited with Winfrey at his Insurance Center office and had called him there. They knew he had Reliance bond forms and powers of attorney.

Regardless of whether this evidence is sufficient to establish apparent authority beyond that stated in the power of attorney, we have no doubt DeBoer is bound by the $500,000 limitation in his power of attorney. "[T]hose who deal with an agent knowing that he is authorized to act by virtue of a power of attorney are bound to ascertain and know the character and extent of the power of attorney under which he assumes to act." 3 Am. Jur. 2d *Agency* § 81 (1962); *accord*, Restatement 2d of Agency § 167 (1958). Comment *a* to the Restatement section explains the rule as follows:

> [I]f a person has means of knowledge reasonably open to him as to the limits of the agent's authority, he cannot hold the principal unless he uses ordinary diligence to ascertain them, even in those situations in which a principal is otherwise held although the agent goes beyond his authority. He has means of knowledge if he knows or has reason to know that the authority is evidenced by a document open to and intended for his inspection.

The rule is similarly stated in the Oklahoma statute defining constructive notice.

> Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself.

Okla. Stat. Ann. tit. 25, § 13 (1971).

The testimony of the responsible person at DeBoer, Jerry Andrews, shows he was aware that Winfrey's authority was defined in a power of attorney, that such instruments may contain limitations, and that he looked to see if one was attached to the bond, but did not read it. The testimony of others at DeBoer, namely Jerry Gaddis and Raymond Slusser, was to the same effect. The evidence falls squarely within the rule stated and DeBoer cannot escape its effect by relying on indicia of a greater apparent authority. Knowledge that an agent has limited authority defeats any right to rely on apparent authority. Mid-Continent Petroleum Corp. v. Wilhoit, 270 P.2d 645 (Okla. 1954); FDIC v. Grim, 86 P.2d 774 (Okla. 1938).

The trial court found DeBoer was excused from knowing the contents of the power of attorney primarily because of the great confidence contractors ordinarily place in bonding companies' representatives. This finding is clearly contradicted by the longstanding rule that it is always competent to limit the authority of an agent, and if the limitations have been brought to the attention of the per-

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[1] (Continued)
of DeBoer. We have previously expressed disapproval of this practice and noted that such findings are not as helpful to an appellate court as those drawn "with the insight of a disinterested mind." Edward B. Marks Music Co. v. Colorado Magnetics, Inc., 497 F.2d 285 (10th Cir. 1974), *cert. den'd*, 419 U.S. 1120.

son dealing with the agent, he is bound by them. 3 Am. Jur. 2d *Agency* § 77 (1962).[2]

For the same reasons Reliance and Insurance Center cannot be liable on the contract made by Winfrey, they cannot be liable for his fraud. A principal is liable for his agent's fraud committed within the apparent scope of his authority. Gilmore v. Constitution Life Ins. Co., 502 F.2d 1344 (10th Cir. 1974); Guardian Foundation v. Turner, 129 P.2d 592 (Okla. 1942); Barry v. Stevens, 31 P.2d 950 (Okla. 1934). If the agent's fraudulent representations are beyond his apparent authority to make on behalf of his principal, the principal cannot be liable. The agent's apparent authority for this purpose is determined in the same manner as his apparent authority to make a contract. *See* Restatement 2d of Agency § 257, Comment *a* (1958). We hold Winfrey's fraudulent representation that he could provide a valid bond for Bruce in the amount of $925,000 was beyond the apparent scope of his authority.

The trial court also held the limitation of authority in the power of attorney was ineffective because an investigation by DeBoer, had it discovered Winfrey's lack of authority, would not have disclosed the fraud. This was based on the court's findings that DeBoer logically would have inquired of Winfrey concerning the discrepancy and that Winfrey could have substituted another power of attorney (other Insurance Center employees had powers unlimited in amount), or otherwise covered his tracks without exciting DeBoer to investigate further. We cannot uphold the judgment on this basis. First, we think the inferences taken from the facts go too far. Second, the judgment in effect holds DeBoer could rely on representations by Winfrey as to his own authority rather than tracing it to his principal. If DeBoer officers had discovered Winfrey's lack of authority, they would have been bound to inquire of his principal. American Nat'l Bank v. Bartlett, 40 F.2d 21 (10th Cir. 1930).

[2] Although a bonding agent's prestige might be a relevant circumstance in determining an agent's apparent authority and the right of a third person to rely thereon, a power of attorney has long been considered an effective means of bringing limitations on authority to the third person's attention and defeating his right to rely on other evidence of authority. The trial court's holding would make powers of attorney without effect as limitations on bonding agents. We cannot agree that this is proper or desirable.



The judgment against Reliance and Insurance Center also was based on negligence. We fully agree with the trial court's finding that they were negligent both in hiring and in supervising Winfrey. The evidence showed he had neither the experience nor the training customarily required for one in his position. Supervision by Reliance and Insurance Center was nonexistent. Nevertheless, we do not believe DeBoer can recover on a negligence theory because it is barred by its contributory negligence. The obligation to exercise reasonable care is a reciprocal duty, Squyres v. Klick, 264 P.2d 325 (Okla. 1953), and we cannot look only at the conduct of Reliance and Insurance Center.

As we have stated in considering other issues in this appeal, the law imposes a duty to exercise reasonable care to ascertain the authority of an agent and to investigate facts that would put a reasonable man on inquiry. *E.g.*, Okla. Stat. Ann. tit. 25 § 13 (1971); 3 Am. Jur. 2d *Agency* § 78 (1962). DeBoer breached this duty when it failed to read Winfrey's power of attorney and discover his lack of authority. This failure contributed to DeBoer's injury. We believe the trial court's finding DeBoer was not guilty of contributory negligence is clearly erroneous.

The trial court found Reliance and Insurance Center were estopped from asserting any defenses to liability for Winfrey's acts. This finding was based on a misrepresentation made by Ben Lewis, the representative of Reliance and Insurance Center, at a meeting held to discuss a possible settlement. At this August 14, 1970, meeting, Lewis stated Reliance was still investigating the Seven Oaks bond

and would consider validating it if economically feasible to do so. He already knew, however, that a decision had been made to deny liability on this bond. An agreement was reached on the Pheasant Run bonds whereby Reliance agreed to accept liability on them in return for DeBoer's promise to release all retainage[3] due Bruce Construction under the contract. DeBoer contends it relied on the representations concerning Seven Oaks in making the Pheasant Run settlement.

The application of estoppel requires that the person to whom the misrepresentation was made must have relied on or acted upon it to his detriment. Gypsy Oil Co. v. Marsh, 248 P. 329 (Okla. 1926). Although we find Reliance's conduct thoroughly condemnable, we do not believe the evidence establishes any detrimental reliance by DeBoer. If DeBoer suffered any detriment, it was in relation to the Pheasant Run settlement, not Seven Oaks. We do not believe a false representation that investigation was continuing, recognizing the possibility that liability could still be denied, estops Reliance from actually denying liability. The statement was false, but not inconsistent with the position later taken. If DeBoer wishes to set aside the Pheasant Run settlement on the basis of fraud, that is a separate question. Reliance is not estopped from denying liability on the Seven Oaks bond.

DeBoer contends the trial court's judgment may be upheld on grounds of waiver and ratification by Reliance and Insurance Center. In our opinion, the evidence on these findings is so deficient that it requires no discussion. The trial court's findings of waiver and ratification are clearly erroneous.

The trial court rendered an alternative judgment in this case. It concluded that even if Winfrey's lack of au-

[3] The term "retainage" refers to the ten percent toward the total contract price DeBoer was authorized to retain from the progress payments until the construction was completed.



thority was a defense to liability in the face amount of the bond, $925,000, Reliance was nevertheless bound to the extent of authority granted in the power of attorney, $500,000. This is a matter of first impression in Oklahoma, and we are inclined to give great deference to the opinion of the resident federal district judge concerning that state's law. His view "carries extraordinary persuasive force on appeal where there are no state decisions on point or none which provide a clear precedent." Land v. Roper Corp., 531 F.2d 445, 448 (10th Cir. 1976); Stevens v. Barnard, 512 F.2d 876, 880 (10th Cir. 1975). In this case we have not been cited to any decision in point.

The issue is whether the principal should be bound on a contract to the extent his agent had authority when the agent made a contract in excess of his authority, defrauding both the principal and the third person with whom he dealt. The American Law Institute recognized the problem in Restatement 2d of Agency § 164 (1958), but did not attempt to state a rule. Section 164(2) states:

> Where the only difference between the contract as authorized and the contract as made is a difference as to amount, or the inclusion or exclusion of a separable part, the principal is liable upon the contract as it was authorized to be made, provided that the other party seasonably manifests his willingness to accept the contract as it was authorized.

The rule is followed by a caveat that it does not include the situation in which the agent in making the unauthorized terms also intends to act in fraud of the principal. No statement is made as to the proper rule in this situation.

There is considerable support in the cases for the Restatement rule of partial validity. The best collection of cases is contained in Walker v. Peake, 150 S.E. 756 (S.C. 1929). *See also* Lachmiller v. Lachmiller Engineering Corp., 301 P.2d 288 (Cal. App. 1956). The rule is statutory in

Oklahoma with respect to powers of attorney authorizing the disposition of real property. Okla. Stat. Ann. tit. 60, § 236 (1971). Unfortunately, the cases do not provide a discussion of the rationale for the rule which would aid us in determining whether it should apply when fraud is involved. According to the Restatement Comments and Reporter's Notes, it is a departure from strict contract principles in an attempt to obtain more equitable results. It is said to be comparable to the rule allowing ratification by a principal of a contract made in excess of the agent's authority. If the principal has the option of accepting the contract in a greater amount, the third person dealing with the agent should be able to accept the contract for the lesser amount originally authorized.

The fairness of the rule is apparent in the case of the honest but mistaken agent. The principal need not be given the option of avoiding the very contract he intended to make because of his agent's mistaken exercise of authority. The fair result is not so apparent when the agent has acted in fraud of the principal. As we stated in discussing other points, one dealing with an agent has a duty to exercise reasonable care to ascertain the agent's authority. One purpose of this rule is to prevent fraud by the agent. We do not believe, however, that the rule permitting partial validity is necessarily at odds with the rule designed to prevent fraud. Holding the principal liable to the extent he has given authority would not diminish the incentive of those dealing with an agent to ascertain his authority. They would still be subject to loss when the agent fraudulently exceeds his authority.

We see no inherent justice in holding the principal for the entire loss when his agent commits fraud within his authority and in allowing him to escape liability entirely when his agent exceeds his authority. The rule of partial validity could have a salutary effect in preventing the type of conduct involved in this case. Reliance set the dollar



limit on Winfrey's authority at a level it felt was an acceptable risk, considering the potential loss compared to the chances its agent would be unfaithful. Thinking itself adequately protected from financial loss, Reliance ignored its duty to supervise its agent and protect the public from loss should Winfrey execute a fraudulent contract in excess of his authority.[4] Dividing the responsibility in the event of loss could encourage both parties to exercise greater prudence than they did in this case.

In considering the legal theory justifying the partial validity rule of Restatement 2d § 164(2), Comment *a* states the rule subjects the principal to liability only in accordance with his expressed intent. Obviously, it is not altogether logical to say the principal subjectively intends to be bound by a contract made by his agent with intent to defraud. As noted above, however, the Comment also concedes the rule is based on equitable rather than contractual principles. We do not believe it does violence to the principle to apply it even when the agent is acting in fraud. The principal has manifested, in a sense, an intent to accept responsibility for his agent's conduct at least to the extent of his authority.[5]

We are not saying the rule of partial validity should apply in all cases involving fraudulent contracts by an agent where the only power exceeded is a limitation on the

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[4] A principal may not turn loose his agent on the public and then merely sit back and exercise little or no supervision." Gilmore v. Constitution Life Ins. Co., 502 F.2d 1344, 1348 (10th Cir. 1974).

[5] Reliance argues the rule of partial validity applies only when the agent has actual express authority to bind the principal. Reliance says its secret limitations on Winfrey's authority gave him no power to bind it without first obtaining its approval. We do not believe these secret limitations should have any effect on the rule. Under contract law a party's intent is determined from his open manifestations, not his secret or uncommunicated intent. *See* 1 Corbin on Contracts § 106 (1963). Under agency law secret limitations on authority generally have no effect on the rights of third persons dealing with the agent. *See* 3 Am. Jur. 2d *Agency* § 82 (1962).

amount. There are arguments on the other side of the issue that may be manifested in a different factual situation. Based on the facts of this case and the context in which it arises—from a judgment of state law by a resident district judge—we find nothing to convince us the trial court was wrong.

The trial court also found that if the performance was valid only to the extent of $500,000, additional damages suffered by DeBoer were covered by an oral contract for a labor and material payment bond. The issues raised are whether the oral promise is within the Statute of Frauds and, if it is, whether it is rendered enforceable under the doctrine of partial performance. Although the trial court found the oral promise was one of indemnity rather than guaranty and not within the Statute, we will assume for our purposes that it is within the Statute. Reliance has failed to show any basis upon which we could conclude the trial court was erroneous in holding there had been sufficient performance by DeBoer to take the contract out of the Statute.[6]

DeBoer argues it paid the premium for the bond and this is sufficient part performance. Reliance answers this argument in one sentence: "There was no 'full or partial performance' as those terms are used by the Oklahoma Supreme Court in making exceptions to the Statute of Frauds." Reliance offers no explanation and citation of authority. We would note that as to contracts involving interests in land, payment alone is not sufficient to take an oral contract out of the Statute under Oklahoma law. *E.g.*, Hickey v. Ross, 172 P.2d 771 (Okla. 1946). There are, however, significant differences between land contracts and promises to answer for the debt or default of another, and we do not believe these cases are necessarily controlling.

[6] We are not sure the Statute of Frauds arguments go to the heart of matters concerning the oral promise of a payment bond. However, it is the only issue clearly drawn in the statement of points and in the briefs. We will resolve the issue in that context.



In 73 Am. Jur. 2d *Statute of Frauds* § 468 (1974) it is stated that the part performance doctrine does not apply to promises to answer for the debt or default of another.[7] While recognizing this as the general rule, 37 C.J.S. *Frauds, Statute of* § 253 (1943) says there is authority holding complete performance by one party will take such a promise out of the Statute. Considering the apparent lack of controlling authority, we believe we should follow our established policy of deferring to the judgment of the resident district judge. Land v. Roper Corp., *supra*, and cases cited therein.

In addition to actual damages, the trial court held Reliance was liable for punitive damages in the amount of $1.00. Because we have held Reliance is not liable under a fraud theory, it follows that the award of punitive damages must be reversed. Reliance is not chargeable with the fraud, malice or oppression required to support the imposition of punitive damages. *See* Oden v. Russell, 251 P.2d 184 (Okla. 1953).

Finally, we must consider the trial court's judgment of indemnity against Insurance Center in favor of Reliance. The trial court made no findings of fact or conclusions of law specifically relating to this issue. However, we believe the documentary evidence and the other trial court findings are sufficient to allow review of the arguments presented by Reliance in support of the judgment.

The only plausible theory argued by Reliance is that Insurance Center's failure to prevent Winfrey's wrongful act constitutes a breach of the agency agreement between them. The record indicates this probably was the basis for

[7] The reason given for the rule in § 468 is that the guarantor receives no benefit from the acceptance of his oral promise. This assumes the guarantor is uncompensated and his only consideration is the third person's agreement to deal with the principal debtor. The present case is distinguished by the fact it involves a commercial surety which receives premiums in return for its guarantees.

the trial court's holding. As a matter of appellate review, we are in as good a position as the trial court to interpret the meaning of a written contract. Rockwood & Co. v. Adams, 486 F.2d 110 (10th Cir. 1973). The provision cited by Reliance states: "The Agent [Insurance Center] is hereby granted authority to solicit and submit applications for . . . surety bonds; . . . in the case of bond such authorization to be set forth in Powers of Attorney and letters of limitation. . . ." As we read the contract, it requires Insurance Center to obtain authority in powers of attorney before allowing any of its agents to solicit and submit surety bonds. Had Insurance Center allowed Winfrey to sell bonds without obtaining authority for him from Reliance, it would have breached the agreement. Having requested authority for Winfrey, Insurance Center complied with the agreement. Reliance then entered a separate agreement with Winfrey and can look only to him to recover its loss.

The trial court specifically found: "Dennis Winfrey was the agent of Reliance Insurance Co. and had authority and the power to bind Reliance in all material respects in this action." By giving Winfrey a power of attorney to act for it, Reliance became his principal and Winfrey had power to bind Reliance directly. We have held he succeeded in doing so in this case to the extent of the authority contained in his power of attorney. His authority to execute Reliance bonds came from Reliance, not Insurance Center. As a matter of contract, Winfrey bound Reliance alone.

Since our judgment is not based on tort law, we need not consider Reliance's arguments concerning its right to indemnity from Insurance Center as a joint tortfeasor.

We have now considered all the issues relating to liability and turn to the issues concerning damages. The trial court found DeBoer was entitled to recover $79,089.60 under the labor and materials payment bond. No error is alleged in the computation of this amount. Under the performance bond, the trial court found DeBoer was entitled to $446,350.06 in cost of completion damages and an additional $108,000.00 in delay damages. Reliance contends the allowance of delay damages was erroneous. Since we have held Reliance liable on the performance bond only to the extent of $500,000, only part of the delay damages is recoverable if properly allowed.



The only evidence that DeBoer suffered loss as a result of delay was the evidence that its sister corporation, Seven Oaks, Inc., which was the owner of the project, had to pay an extra $108,000 in interest on the interim construction loan. Seven Oaks, Inc., and DeBoer Construction, Inc. were both wholly-owned subsidiaries of Jack P. DeBoer Associates, Inc. There was no evidence that DeBoer Construction was charged in any way for delay damages. DeBoer defends the award on the ground that a backcharge between these wholly-owned subsidiary corporations would be a useless act not required by law. We do not agree.

DeBoer's argument asks us to disregard the separate legal identities of these two corporations. This is the converse of the usual situation in which the rule for disregarding the corporate entity is applied to prevent injustice to a third person injured by the subsidiary corporation. Although indicating it might be allowed in a proper case, the courts have not looked favorably upon shareholders' attempts to deny the existence of their own corporations. Those responsible for the existence of a corporation are not entitled to have it disregarded in order for them to gain an advantage that would be lost under it. 1 W. Fletcher, Private Corporations § 41.2 n. 24 (Rev. Ed. 1974), and cases cited therein. This Court has noted that Oklahoma law permits disregard of the corporate entity if used to defeat public convenience, justify wrong, perpetrate actual or implied fraud, or defend crime. Robertson v. Roy L. Morgan Production Co., 411 F.2d 1041 (10th Cir. 1969). The reason for doing so when these factors are present is quite

clear. "Where, however, a corporation or an individual has organized another corporation to carry on a particular operation, the reasons for permitting a parent corporation to disregard for purposes of suit the separate identity of the wholly-owned subsidiary corporation are not apparent." E. M. Fleishmann Lumber Corp. v. Resources Corp. Int'l, 105 F. Supp. 681, 690 (D. Del. 1952). In cases analogous to the present, the courts have denied a plaintiff the right to disregard a corporate entity it created in order to recover additional damages. Verzani v. State Dept. of Roads, 195 N.W.2d 762 (Neb. 1972); Sams v. Redevelopment Authority, 244 A.2d 779 (Pa. 1968).

In the present case we see no reason to disregard the separate identities of Seven Oaks, Inc., and DeBoer Corporation. Moreover, there is good reason to refuse. Because of the limited liability of the separate corporations, there would be potential danger to creditors of the corporation which retained the loss on its books without directly obtaining a recovery. The parent of both subsidiary corporations could let the one accept the loss and go into bankruptcy while retaining the recovery in the corporation which does not show the loss. Therefore, we believe the two corporations must be treated as the separate persons they are intended by law to be. Proof that Seven Oaks suffered certain damages is in no way proof of DeBoer Construction's damages. DeBoer failed to produce evidence of its damages for delay and cannot recover them.

Several other issues have been raised in the briefs. We have reviewed them and find only one that merits further discussion in this opinion. All parties are agreed that the trial court erroneously compounded postjudgment interest upon prejudgment interest in computing the amount of the judgment. Our disposition of the case will require recomputation of the interest and this mistake may be avoided on remand.



We affirm the judgment insofar as it holds Reliance liable for $446,350.06 on the Seven Oaks performance bond and for $79,235.44 on the oral promise of a labor and materials payment bond. The judgment against Insurance Center is reversed. The case is remanded for the entry of a proper judgment in accordance with this opinion.

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## APPENDIX B

(Entered September 17, 1976)

JULY TERM—September 17, 1976

Before The Honorable David T. Lewis, Chief Judge,
The Honorable Jean S. Breitenstein, Senior Judge,
The Honorable Delmas C. Hill,
The Honorable Oliver Seth,
The Honorable William J. Holloway, Jr.,
The Honorable Robert H. McWilliams,
The Honorable James E. Barrett and
The Honorable William E. Doyle, Circuit Judges

| | | |
|---|---|---|
| DE BOER CONSTRUCTION, INC., Plaintiff-Appellee, | ) | |
| vs. | ) | No. 74-1581 |
| RELIANCE INSURANCE COMPANY, a corporation, Defendant-Appellant, | ) | |
| THE INSURANCE CENTER, INC., a corporation, BRUCE DEVELOPMENT CORP., a corporation, WAYNE BRUCE, Defendants. | ) | |

| | | |
|---|---|---|
| DE BOER CONSTRUCTION, INC., Plaintiff-Appellee, | ) | |
| vs. | ) | No. 74-1582 |
| THE INSURANCE CENTER, INC., a corporation, Defendant-Appellant, | ) | |
| RELIANCE INSURANCE COMPANY, a corporation, BRUCE DEVELOPMENT CORP., a corporation, WAYNE BRUCE, Defendants. | ) | |
| DE BOER CONSTRUCTION, INC., Plaintiff-Appellant, | ) | |
| vs. | ) | No. 74-1583 |
| RELIANCE INSURANCE COMPANY, a corporation, THE INSURANCE CENTER, INC., a corporation, BRUCE DEVELOPMENT CORP., a corporation, WAYNE BRUCE, Defendants-Appellees. | ) | |

This matter comes on for consideration of the petition for rehearing filed by Reliance Insurance Company in the captioned causes and the suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by Senior Circuit Judge Breitenstein and Circuit Judges Hill and Barrett to whom the case was argued and submitted.

The petition for rehearing having been denied by the original panel to whom the case was argued and submitted



and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS, Clerk

s/ By Robert L. Hoecker
Robert L. Hoecker
Chief Deputy Clerk

A true copy
Teste

(Seal)

Howard K. Phillips
Clerk, U. S. Court of
Appeals, Tenth Circuit

By Linda A. Hall
Deputy Clerk

# APPENDIX C

FILED
MAY 7 1974
REX B. HAWKS
CLERK U. S. DISTRICT COURT
WALTER A. MOUNTS
Deputy

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

| | | |
|---|---|---|
| DeBOER CONSTRUCTION, INC., | ) | |
| | ) | |
| Plaintiff, | ) | |
| vs. | ) | |
| | ) | |
| RELIANCE INSURANCE COMPANY, a Corporation; THE INSURANCE CENTER, INC., a Corporation; BRUCE DEVELOPMENT CORP., a Corporation; WAYNE BRUCE, | ) | No. CIV-71-252 |
| | ) | |
| Defendants. | ) | |

JOURNAL ENTRY OF JUDGMENT

Based upon the Findings of Fact and Conclusions of Law filed herein on this day and date, the Court enters its judgment as follows:

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff, DeBoer Construction, Inc., have and recover judgment against defendants, Reliance Insurance Company, a corporation, The Insurance Center, Inc., a corporation, Bruce Development Corp., a corporation and Wayne Bruce, jointly and severally in the amount of $729,235.44 together with interest thereon at the rate of ten percent (10%) per annum as provided by law and until such time as said judgment is satisfied.



IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff, DeBoer Construction, Inc., have and recover judgment against the defendant, Reliance Insurance Company, in an additional sum to the judgment hereinbefore rendered in the amount of $1.00 as and for punitive damages.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant, Reliance Insurance Company, have and recover judgment against the defendants, The Insurance Center, Inc., Bruce Development Corp. and Wayne Bruce for all sums of money paid by Reliance Insurance Company to the plaintiff, DeBoer Construction, Inc.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Counter-Claim of Bruce Development Corp. against the plaintiff, DeBoer Construction, Inc., be and the same is hereby denied and dismissed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the court costs herein expended be assessed against the defendants.

Dated this 7th day of May, 1974.

s/ Luther Bohanon
UNITED STATES DISTRICT JUDGE

ENTERED IN JUDGMENT DOCKET
ON MAY 7, 1974

ADELAIDE HOLSTON, DEPUTY

# APPENDIX D

## OKLAHOMA STATUTES

## CHAPTER 21.—UNIFORM CERTIFICATION OF QUESTIONS OF LAW ACT [NEW]

Laws 1973, C. 22, Operative July 1, 1973

### § 1601. Short title

This act may be cited as the Uniform Certification of Questions of Law Act.

### § 1602. Power to answer

The Supreme Court and the Court of Criminal Appeals respectively may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, a United States District Court, or the highest appellate court or the intermediate appellate court of any other state, when requested by the certifying court if there are involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court or Court of Criminal Appeals of this state.

### § 1603. Method of invoking

This act may be invoked by an order of any of the courts referred to in Section 2 upon the court's own motion or upon the motion of any party to the cause.

### § 1604. Contents of certification order

A certification order shall set forth:

1. The questions of law to be answered; and

2. A statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose.



### § 1605. Preparation of certification order

The certification order shall be prepared by the certifying court, signed by the judge presiding at the hearing, and forwarded to the Supreme Court or Court of Criminal Appeals by the clerk of the certifying court under its official seal. The Court to which the certification order is directed may require the original or copies of all or of any portion of the record before the certifying court to be filed with the certification order, if, in the opinion of the Court, the record or portion thereof may be necessary in answering the questions.

### § 1606. Costs of certification

Fees and costs shall be the same as in civil appeals docketed before the Supreme Court and shall be equally divided between the parties unless otherwise ordered by the certifying court in its order of certification.

### § 1607. Briefs and argument

Proceedings in the Supreme Court or Court of Criminal Appeals shall be as provided by rule of the court or by law governing briefs and arguments.

### § 1608. Opinion

The written opinion of the Supreme Court or Court of Criminal Appeals stating the law governing the questions certified shall be sent by the clerk under the seal of the Court to the certifying court and to the parties.

### § 1609. Power to certify

The Supreme Court or the Court of Criminal Appeals of this state, on their[1] own motion or the motion of any party, may order certification of questions of law to the

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[1] Should probably read "its".

highest court of any state when it appears to the certifying court that there are involved, in any proceeding before the court, questions of law of the receiving state which may be determinative of the cause then pending in the certifying court and it appears to the certifying court that there are no controlling precedents in the decisions of the highest court or intermediate appellate courts of the receiving state.

**§ 1610. Procedure on certifying**

The procedures for certification from this state to the receiving state shall be those provided in the laws of the receiving state.

**§ 1611. Construction**

This act shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

**§ 1612. Severability**

The provisions of this act are severable and if any part or provision hereof shall be held void the decision of the court so holding shall not affect or impair any of the remaining parts or provisions of this act.

**§ 1613. Operative date**

The provisions of this act shall become operative from and after July 1, 1973.

---

**CERTIFICATE OF SERVICE**

I hereby certify that the following named parties,

Mr. Brian G. Grace
Curfman, Brainerd, Harris, Bell, Weigand & Depew
803 First National Bank Building
Wichita, Kansas 67202

Mr. William J. Ross
Rainey, Flynn, Welch, Wallace, Ross & Cooper
735 First National Center
Oklahoma City, Oklahoma 73102
Attorneys for DeBoer Construction, Inc.

Mr. Wm. G. Smith
Fenton, Fenton, Smith, Reneau & Moon
P. O. Box 1638
Oklahoma City, Oklahoma 73192
Attorneys for The Insurance Center, Inc.,

required by law to be served in this case, were this day mailed three copies of the foregoing Petition for Certiorari, postage prepaid.

Dated: October 28, 1976.

John B. Hayes

John B. Hayes

Supreme Court, U. S.
FILED
NOV 29 1976
MICHAEL RODAK, JR., CLERK

In the

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

## No. 76-608

RELIANCE INSURANCE COMPANY,
*Petitioner,*

VERSUS

DEBOER CONSTRUCTION, INC. and
THE INSURANCE CENTER, INC.,
*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals, Tenth Circuit**

## BRIEF FOR RESPONDENT THE INSURANCE CENTER, INC., IN OPPOSITION

WM. G. SMITH (and EDWARD L. RAY), of
FENTON, FENTON, SMITH, RENEAU & MOON
405 Midland Center—P. O. Box 1638
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*Attorneys for Respondent,*
*The Insurance Center, Inc.*

November, 1976

UTTERBACK TYPESETTING CO. 519 W. CALIF., OKLAHOMA CITY. PH. 235-0030

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In the

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-608

RELIANCE INSURANCE COMPANY,
*Petitioner,*

VERSUS

DEBOER CONSTRUCTION, INC. and
THE INSURANCE CENTER, INC.,
*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals, Tenth Circuit**

# BRIEF FOR RESPONDENT THE INSURANCE CENTER, INC., IN OPPOSITION

## OPINION BELOW

The opinion of the court below in DeBoer Construction, Inc. v. Reliance Ins. Co., et al., is now reported in 540 F.2d 486 (10th Cir. 1976), and is appended to the Petition for Writ of Certiorari.

## QUESTIONS PRESENTED

Petitioner has submitted four questions for consideration by this Court. Three of such questions are directed toward the affirming of a partial judgment in favor of Respondent DeBoer Construction Company and against Peti-

tioner only; and only one, namely, the denial of indemnity for Petitioner against The Insurance Center, Inc., is applicable to this respondent.

For the purpose of this petition, the actual issues as to this respondent are:

1. Should this Court review and overturn the concurrent findings of two lower federal courts that Winfrey was the agent of Reliance in this action.

2. Should this Court review and overturn the findings of the court below that Reliance is not entitled to indemnity from Insurance Center for wrongful acts of Reliance's agent Winfrey by contract or otherwise.

## STATEMENT OF THE CASE

In this response, the Petitioner, Reliance Insurance Company, will be referred to as Reliance; Respondent, DeBoer Construction, Inc., as DeBoer; and this Respondent, The Insurance Center, Inc., as Insurance Center.

Petitioner's statement of the case is substantially correct as relates to DeBoer and the partial judgment affirmed by the court below. However, as relates to the issues of Petitioner's right of indemnity against Respondent Insurance Center, the Petitioner's statement of facts is inaccurate, incomplete and misleading.

As pertinent herein, Winfrey was a licensed insurance agent for Petitioner Reliance and other insurance companies. Although he worked at The Insurance Center along with other insurance agents under an employment contract,



Winfrey was directly appointed by Reliance as its attorney-in-fact with limited powers of attorney of Reliance under a separate written agreement (letters of limitation) with Reliance. In such agreement, Winfrey agreed with Reliance not to issue construction bonds without prior approval of Reliance.

It was the unauthorized and fraudulent misuse of Winfrey's power of attorney from Reliance (limited to $500,000.00, but attached to a bogus $925,000.00 construction bond), which was the basis of DeBoer's claim for damages, and violated the agreements between the agent Winfrey and his principal, Reliance.

Petitioner also failed to state that The Insurance Center did not issue the subject bogus bond, did not authorize any such bond, did not know of such bond, did not ratify such bond, and did not receive any benefit from the issuance of such bond; and both the trial court and Court of Appeals so found.

The Court of Appeals had before it, as a part of the record, the contract and agreement wherein Reliance appointed Winfrey as its agent (attorney-in-fact), the agency contract between Reliance and The Insurance Center, and the employment contract between Winfrey and Insurance Center (the latter relating to administration duties within the agency and not to the issuance of powers of attorney or construction bonds). The Court of Appeals properly found that the documentary evidence before it and other trial court findings, were sufficient to allow a review by the Court of Appeals of this issue (without returning it to the trial court for specific findings and conclusions). Al-

though the State Law (Oklahoma and elsewhere) fully support the court below, it was merely a matter of reading the plain language of the two contracts. As found by the court below, "As a matter of contract, Winfrey bound Reliance alone."

It should be noted that there are no provisions in the separate Reliance-Insurance Center Agency agreement by which Insurance Center would indemnify Reliance for fraudulent or unauthorized acts of attorneys-in-fact appointed by Reliance. Even if indemnity could be inferred, judgment over would not be proper under the facts and under the findings of both lower courts. *Sinclair Oil & Gas Co.* v. *Brown*, 333 F.2d 967 (10th Cir. 1964); *National Trailer Convoy* v. *Oklahoma Turnpike Authority*, 434 P.2d 238, 241 (Okl. 1967); *Sinclair Prairie Oil Co.* v. *Thornley*, 127 F.2d 128 (10th Cir. 1942).

Petitioner has requested that this Court grant certiorari, and send the action to the State Supreme Court for its determination of abstract questions of law.

The question whether Reliance is entitled to indemnity in this case is basically one of fact. The Court of Appeals found (540 F.2d at p. 495):

> "The trial court specifically found: 'Dennis Winfrey was the agent of Reliance Insurance Co. and had authority and the power to bind Reliance in all material respects in this action.' By giving Winfrey a power of attorney to act for it, Reliance became his principal and Winfrey had power to bind Reliance directly. We have held he succeeded in doing so in this case to the extent of the authority contained in his power of attorney. His authority to execute Reliance bonds came



> from Reliance, not Insurance Center. As a matter of contract, Winfrey bound Reliance alone."

Voluminous other issues were before the trial court and the appellate court, all of which, of course, were involved in the final determination of this cause.

Regardless of the ultimate determination by this Court as to the other portions of the opinion affirming partial judgment against Reliance, this factual determination of agency by the Court of Appeals, under which Reliance is not entitled to indemnity against Insurance Center, should not be a subject for review by this Court, nor is it a proper subject for certified question to the Supreme Court of Oklahoma.

## PETITIONER'S AUTHORITIES DISTINGUISHED

Petitioner submits *Victory Carriers, Inc.* v. *United States* (Ct. Clms. 1972), 467 F.2d 1334, and other references in footnotes at page 31 of the Petition, as authority that an agent may be responsible to his principal for unauthorized acts of a sub-agent appointed by the agent.

These cases are clearly distinguishable. These cases deal with a true sub-agent for whom appointing agent may be responsible (under the particular facts in those cases).

It is interesting to note that on pages 14 through 16 of the Petition, Reliance refers to Winfrey's limited powers and limited authority as agent of Reliance. Only with respect to Reliance's claim for indemnity does Winfrey become a non-agent. As found by the court below, "Reliance

then entered a separate agreement with Winfrey and can look only to him to recover its loss" (540 F.2d at p. 495).

To the same effect is 3 Am.Jur.2d, *Agency*, § 514, p. 545, and 43 Am.Jur.2d, *Insurance*, § 162, p. 216.

Here, Winfrey was not a sub-agent of Insurance Center as there was a direct appointment of Winfrey by Reliance as its agent.

## CONCLUSION

It is respectfully submitted that Petitioner has failed to establish any special or important reason why the Writ should be granted on the denial of indemnity or judgment over against this Respondent. Petitioner's submitted allegations of fact and law do not support indemnity herein. The Court of Appeals correctly applied the basic law to the established facts.

This Respondent respectfully submits that the "partial validity doctrine," if allowed to stand under the facts of this case, would encourage and reward persons dealing with an agent to ignore known limitations of authority and to disregard warnings and other information which should require reasonable inquiry as to the agent's actual authority.

Here, DeBoer had all of the information before it to determine the bond was unauthorized and invalid. When DeBoer belatedly made inquiry, it was immediately advised by Reliance that the bond was unauthorized and improper (as shown by the power of attorney attached to the bond from the onset). DeBoer is being benefited by the



admitted and found neglect; and, under all the facts, DeBoer was the only one who had the last clear chance to avoid any loss from the acceptance of the unauthorized bond.

This "partial validity doctrine" establishes that something invalid becomes partially valid in equity. Equity has always refused to assist one who, by his own neglect, has caused a loss.

It is basic that one who is knowingly dealing with an agent has the duty and obligation to determine the nature and extent of the agent's authority. One dealing with an agent should not be permitted to cause a loss through his dereliction of duty of reasonable inquiry and then be allowed to recover one-half million dollars from a principal who had no knowledge that a third party was even dealing with the agent.

The indemnity issue is not properly before this Court, and regardless of the action taken to the "partial validity" question, the issue directed toward this Respondent should not be reconsidered by this Court, nor by the Supreme Court of Oklahoma.

Respectfully submitted,

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November, 1976

**CERTIFICATE OF SERVICE**

I hereby certify that the following named parties,

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required by law to be served in this case, were this day mailed three copies of the foregoing BRIEF OF RESPONDENT, THE INSURANCE CENTER, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI, postage prepaid.

Dated: November 24, 1976.

Wm. G. Smith

Supreme Court, U. S.
FILED
JAN 4 1977
MICHAEL RODAK, JR., CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-608

RELIANCE INSURANCE COMPANY,
*Petitioner,*

vs.

DeBOER CONSTRUCTION, INC., and
THE INSURANCE CENTER, INC.,
*Respondents.*

## REPLY BRIEF OF RESPONDENT DeBOER CONSTRUCTION, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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# In the Supreme Court of the United States

OCTOBER TERM, 1976

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**No. 76-608**

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RELIANCE INSURANCE COMPANY,
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## REPLY BRIEF OF RESPONDENT DeBOER CONSTRUCTION, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Hereinafter the parties are referred to as "Reliance" for petitioner, Reliance Insurance Company; "DeBoer" for respondent, DeBoer Construction, Inc.; and "Insurance Center" for respondent, The Insurance Center, Inc. This Brief is limited to a rebuttal of an argument advanced by Reliance in its REPLY BRIEF which concerns its alternative prayer for the certification of questions of law to the Oklahoma Supreme Court pursuant to the Uniform Certification of Questions of Law Act.

The United States Court of Appeals for the Tenth Circuit based its decision concerning this respondent on two legal doctrines. The first was the partial validity exception doctrine regarding the power of attorney affixed to a performance bond, and the second was the partial performance doctrine which exempted promises by petitioner's agent from the provisions of the Oklahoma Statute of Frauds. Reliance now, and for the first time, asks this Court to certify legal questions to the Oklahoma Supreme Court concerning these doctrines.

Reliance, in its Reply Brief, substantially distorts the history of the litigation in replying to the claim by DeBoer that it is guilty of laches for not requesting certification earlier. Reliance (REPLY BRIEF, p. 6) contends that prior to the Court of Appeals decision it did not know that this case could be decided upon legal doctrines of first impression in Oklahoma. Reliance also contends (REPLY BRIEF, p. 6) that its only remedy after the decision was to petition for rehearing and that prior to its Petition for Certiorari the case was improper for certifying questions of law. Reliance does not dispute the fact that Oklahoma law permitted certification at any stage of the litigation, even before trial. Reliance's arguments leave the reader with the impression that the Court of Appeals decided this case on two obscure and otherwise inconsequential doctrines of which Reliance had no knowledge prior to the decision. This impression is simply not true. A summary of the litigation, chronologically presented hereafter, shows that these doctrines were key issues for years before the Court of Appeals decision. The summary refers to only the most major points in the litigation.

On December 28, 1971, DeBoer moved the trial court for partial summary judgment based upon the partial



validity exception doctrine. Reliance filed its own motion for summary judgment and its brief on May 17, 1972, in which it discussed the partial validity exception doctrine and raised the Statute of Frauds questions. Reliance spent *seven pages* of that brief discussing the partial validity exception doctrine and referred to many of the legal authorities cited herein by it and DeBoer. Reliance's claim that it was surprised that these doctrines were relied upon by the Court of Appeals is ridiculous since it had briefed these doctrines in the trial court more than *four years* before the Court of Appeals decision.

The Uniform Certification of Questions of Law Act was first effective in Oklahoma on *July 1, 1973.* Subsequent to the effective date of the Act, the following major pleadings, briefs and arguments were submitted to the trial court and the Court of Appeals wherein the doctrines noted above were discussed:

1. DeBoer's Trial Brief (January 7, 1974)
2. Reliance's Trial Brief (January 24, 1974)
3. Insurance Center's Trial Brief (January 24, 1974)
4. Trial (March 19 and 20, 1974)
5. DeBoer's Suggested Conclusions of Law (March 11, 1974)
6. Reliance's Suggested Conclusions of Law (April 12, 1974)
7. Insurance Center's Suggested Conclusions of Law (April 12, 1974)
8. Reliance's Motion for New Trial (May 20, 1974)
9. Insurance Center's Motion for New Trial (May, 1974)

10. Reliance's initial Brief with the Court of Appeals (April, 1975)
11. Insurance Center's initial Brief with the Court of Appeals (April, 1975)
12. DeBoer's Responsive Brief in the Court of Appeals (July, 1975)
13. Reliance's Reply Brief in the Court of Appeals (September, 1975)
14. Insurance Center's Reply Brief in the Court of Appeals (October, 1975)
15. Argument of Appeal (November 18, 1975); and
16. Reliance's Petition for Rehearing (September, 1976)[1]

Reliance could have asked the trial court or the Court of Appeals to certify any unresolved questions of Oklahoma law to the Oklahoma Supreme Court at any point during the over three year period noted above, but chose not to do so.

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1. By contrast, note the conduct of the party seeking certification as discussed by Mr. Justice Rehnquist in his concurring opinion in *Lehman Bros.* v. *Schein*, 416 U.S. 386 (1974).



## CONCLUSION

Reliance has failed at every possible opportunity to request certification of questions of law to the Oklahoma Supreme Court. It does so now only as a last-ditch effort to further extend this litigation when it seems obvious to it that it will not obtain the result it desires from the federal judiciary. For the reasons set out herein and in the prior Brief filed by DeBoer herein, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Supreme Court, U. S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1976

**No. 76-608**

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## BRIEF OF RESPONDENT DeBOER CONSTRUCTION, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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**No. 76-608**

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**BRIEF OF RESPONDENT DeBOER CONSTRUCTION, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

Respondent, DeBoer Construction, Inc. (hereafter "DeBoer") respectfully prays that this Court deny the Petition for Writ of Certiorari filed herein by Reliance Insurance Company (hereafter "Reliance") seeking a review of the judgment of the United States Court of Appeals for the Tenth Circuit in *DeBoer Construction, Inc.* v. *Reliance Insurance Company and The Insurance Center, Inc.*, 540 F.2d 486 (10th Cir. 1976).

## QUESTIONS PRESENTED

1. Do the issues of this case present sufficiently special and important reasons to grant the Petition?

2. Is a grant of the Petition for the sole purpose of certifying questions of law to the Supreme Court of the State of Oklahoma justified and timely?

3. Did the Court of Appeals properly apply the partial validity exception doctrine to the unique facts of this case?

4. Did the Court of Appeals properly determine that DeBoer was entitled to a judgment based upon the oral promise to execute a payment bond?

5. If the Petition is granted, is DeBoer entitled to have its judgment affirmed upon other grounds than those stated by the Court of Appeals?

## STATEMENT OF FACTS

This litigation arose out of a fraudulent scheme perpetrated on DeBoer by Dennis Winfrey (hereafter "Winfrey") and Wayne Bruce (hereafter "Bruce"). Winfrey was a general agent and attorney-in-fact for Reliance and an Assistant Vice-President and Bond Department Manager of an Oklahoma City independent insurance agency, The Insurance Center, Inc. (hereafter "Insurance Center"). Bruce controlled Bruce Development Corp. (hereafter "Bruce Dev."), a carpentry subcontractor on two apartment projects, Seven Oaks and Pheasant Run. DeBoer was the general contractor for those projects. The Seven Oaks Apartment Project is located in Peoria, Illinois (hereafter "Seven Oaks"), and the Pheasant Run Apartment Project is located in Oklahoma City (hereafter "Pheasant Run"). Winfrey and Bruce conspired to defraud DeBoer through the issuance of performance and payment bonds guaranteeing the performance of Bruce Dev. on Seven Oaks and Pheasant Run. Without the bonds Bruce Dev. would never have been granted the subcontracts on either project. When Bruce Dev. breached its subcontracts with DeBoer, and Reliance refused to honor the bonds, litigation ensued.



The original trial Record consisted of over 50 volumes of evidence and pleadings, including 4,000 pages of depositions and trial transcripts. It was thereafter reduced to a four-volume Appendix to the Briefs containing 882 pages of pleadings, testimony and exhibits. This STATEMENT OF FACTS generally follows the sequence of the "Basic Facts" appearing at pages 6-11 of the Petition (hereafter "Pet."). This is done to enable this Court to more fully understand the facts of this case and the issues involved and because Reliance has frequently either misstated the evidence or failed to include significant facts. (For example, Jerry Elkins' name does not appear anywhere in the Petition. Elkins was a general agent and attorney-in-fact for Reliance and was Winfrey's assistant in Insurance Center's Bond Department. Elkins was involved in many significant events of the fraud, including delivery of bonds and *personally drafting* the Seven Oaks performance bond out of which this litigation arose.)

Reliance says it issued a power of attorney to Winfrey at Insurance Center's request " . . . believing Winfrey to be competent and honest, . . ." (Pet. p. 6). The Court of Appeals agreed with the trial court's finding that Reliance was negligent in furnishing a power of attorney to Winfrey and in supervising him; and, that Winfrey had neither the experience nor training customary for one in his position.[1] Winfrey was first employed by Insurance Center in June, 1967, as a trainee for property and casualty insurance (not surety). In July, 1968, he received his power of attorney from Reliance and three months later became Bond Department Manager of Insurance Center. Winfrey had no experience in the bond business prior to June, 1967. Bill Stafford (hereafter "Stafford") was the head of Reliance's

1. *DeBoer Const., Inc.* v. *Reliance Ins. Co.*, 540 F.2d 486 at 491-2 (10th Cir. 1976).

Dallas regional office for bond underwriting and sales. Stafford recommended that Winfrey be granted a power of attorney after meeting him once and obtaining no information concerning his experience. Stafford *could not recall* how he obtained the information he put into his formal written Recommendation. The Recommendation recited that Winfrey had worked with Insurance Center for three years despite Stafford's own records showing that Winfrey had only been a licensed insurance agent for approximately three months. The Recommendation stated that Winfrey had five years experience in handling bonds prior to his association with Insurance Center, whereas Winfrey's Application for his three-month-old license, which Reliance approved, disclosed no bond experience. Insurance Center denied furnishing any of the above information to Stafford.

Stafford admitted that he wanted to get persons to increase bond sales for Reliance in Oklahoma and felt Winfrey could promote bond business. Stafford, Robert Bedworth (Reliance's head of Construction Bond Underwriting), and an expert witness called by Reliance all admitted that sales and customer service were the primary purposes for powers of attorney. Bedworth admitted that insurance companies use powers of attorney as competitive devices to promote sales, and the trial court found that Reliance engaged in such practice. Stafford likened a power of attorney to a *signed blank check.*

As Bond Department Manager, Winfrey had control of all Reliance bonds issued through Insurance Center. Six other agents at Insurance Center, including Winfrey's secretary, held unlimited powers of attorney from Reliance. When Winfrey received his power of attorney it was the only one in the agency that was limited. More attorneys-in-fact were appointed by Reliance at Insurance Center



than were necessary for the surety business in Oklahoma City. Winfrey used his secretary's power of attorney from Reliance on other fraudulent bonds. Winfrey never wrote a reported bond for Reliance for the entire two years he held the power of attorney. Stafford, with full knowledge of Winfrey's position, made no attempt to supervise his conduct.

Reliance claims (Pet. p. 6) that written Instructions prohibited Winfrey from executing any bond without the consent of Reliance. These Instructions, of course, were never made available to any of Reliance's bond clients. The Instructions did not limit the consent to only Reliance but also included the person who was Bond Department Manager when Winfrey got his power of attorney.

The Agency Agreement between Insurance Center and Reliance provided that Reliance retained its right to control all bond forms, powers of attorney and seals. Reliance failed to ever exercise any control over its forms, powers and seals. Employees of Insurance Center exceeded their Instructions from Reliance three times within seven years preceding Winfrey's employment, but Reliance did nothing to reduce the limits of any outstanding powers of attorney or to require any training for any agents. Reliance admitted that it failed to use a control system to account for bond supplies because the cost of such control system would exceed the risk of loss *to Reliance.*

Reliance claims that efforts were made to find a bonding company for Bruce Dev., but that such efforts did not include Reliance (Pet. pp. 6-7). A file concerning Bruce Dev. was found among the records of Insurance Center. Reliance never mentions, however, that Winfrey discussed bonds for Bruce Dev. with Stafford, took him to Pheasant Run and agreed to send him information concerning Bruce Dev. Stafford *could not recall* receiving such information.

Reliance claims Winfrey delivered forms to Bruce and his wife who in turn filled out the forms and delivered them to the proposed obligees (Pet. p. 7). In fact, the Pheasant Run bonds, on which Reliance admitted liability, were delivered to DeBoer by Winfrey and Elkins. The Seven Oaks performance bond was filled out by Elkins and delivered to DeBoer by Winfrey and Bruce. Just three days prior to Elkins' filling out the Seven Oaks performance bond, Insurance Center, with Reliance's approval, submitted an Application for his appointment as a property, casualty and surety agent of Reliance. This appointment was approved and a power of attorney issued to Elkins long before discovery of the fraud. Elkins, naturally, claimed that he knew nothing of the fraud and that the power of attorney and Seven Oaks performance bond he filled out were just fine print that he did not understand. Elkins and Winfrey appeared as representatives of Reliance at numerous meetings with DeBoer and Bruce during construction of Pheasant Run and Seven Oaks.

Reliance claims that Winfrey never collected any premiums for the bonds (Pet. p. 7). Winfrey did collect premiums on both projects, after submitting invoices on old Insurance Center invoice forms, and kept them without DeBoer's knowledge.[2]

DeBoer's vice-president did not read the language of the power of attorney attached to either the Pheasant Run or Seven Oaks bonds to determine if it complied with the face amount of the bonds. He checked to see that a power of attorney was attached and assumed it was valid. At the time of the fraud, DeBoer was a five-man operation. The vice-president involved was a high school graduate, in his mid-twenties, and whose experience with bonds had been

2. *Id.* at 489-490.



limited to picking up bond forms for his father-in-law. He was in reality a construction superintendent.

During a space of 11 months, Winfrey issued at least 12 fraudulent bonds, including DeBoer's. These bonds involved five different projects, four owners or contractors, had cumulative penalties of over $3,500,000, and generated nearly $15,000 in premiums. Some of these other bonds contained no power of attorney at all and some contained the power of attorney and forged signature of Winfrey's secretary, who never met the other obligee involved. Reliance admitted liability on all bonds except Seven Oaks. In connection with these other bonds, the fraud went undetected by a Peoria, Illinois, bank which was the construction lender on Seven Oaks, the title insurance company on Seven Oaks, the vice-president of an Oklahoma City bank which was the construction lender on Pheasant Run and who personally felt Bruce was dishonest, architects who received bonds with Winfrey's secretary's power of attorney and forged signature, a large multi-state construction company from Tennessee who received a number of different bonds from Bruce through different companies, and an undetermined number of other persons who were defrauded by Winfrey. Reliance claims it is still unable to account for the number of powers of attorney and bonds which were used by Winfrey.

Reliance claims that had DeBoer's construction superintendent read the power of attorney he would have learned that Winfrey had no authority. Utilizing typical insurance contract succinctness and brevity, the sentence in the power of attorney which restricts Winfrey is comprised of over 130 words and has in excess of 20 punctuation marks. When asked to explain the significance of the power of attorney after discovery of the fraud, DeBoer's employees had various ideas as to what it meant. One be-

lieved (prophetically) that DeBoer had a $500,000 bond and another believed that DeBoer had a bond for $925,000 plus $500,000. These facts, and issues raised from them, were not considered by the Court of Appeals.[3]

Reliance claims that oral statements of Winfrey were the only representations to DeBoer concerning Winfrey's authority. This ignores events over a period of months, before and after Elkins' participation, including correspondence with the President of Insurance Center concerning insurance on the projects, trips to DeBoer's Wichita, Kansas, offices and to Pheasant Run by Winfrey and Elkins, a visit to Insurance Center's offices by a DeBoer employee, and correspondence from Winfrey—all of which confirmed that Winfrey was who he said he was, a general surety agent for Reliance and Assistant Vice-President and Bond Department Manager for the largest insurance agency in Oklahoma. Reliance's claim also ignores the fact that all bond forms, seals and powers of attorney utilized in this fraud were owned by Reliance, created by Reliance, and furnished to Winfrey by Reliance.

Reliance curiously claims that DeBoer had notice of other facts which should have led to discovery of the fraud (Pet. pp. 8-9). These other facts came from the vice-president of the Oklahoma City bank that financed the construction of Pheasant Run. He testified at trial as to his experience in the construction industry and his distrust of Bruce. When shown the Pheasant Run performance bond, he called Insurance Center and spoke with its Bond Department Manager, Winfrey, who assured him as to Bruce Dev.'s bonding capability. Knowing the good reputation of Insurance Center and Reliance, he made no further inquiry as to Bruce's financial abilities. He

3. *Id.* at 496.



never again questioned Bruce's financial problems with DeBoer.

Reliance claims that immediately upon discovery of the fraud it denied liability to DeBoer on the Seven Oaks bonds based upon the insufficiency of the power of attorney (Pet. pp. 9-10). In fact, Reliance concealed its decision on liability until it had persuaded DeBoer to give it control of Bruce Dev.'s contract on Pheasant Run and $30,000 in retainage money. This was a deliberate misrepresentation for the benefit of Reliance. Reliance's conduct was thoroughly condemnable.[4]

## ARGUMENT

### The Petition Does Not Present Sufficiently Special or Important Reasons to Justify the Granting of a Writ of Certiorari

A Writ of Certiorari is granted as a matter of discretion based upon the significance of the questions involved. The only basis upon which a Writ of Certiorari could conceivably be granted is set forth in Rule 19, United States Supreme Court Rules, Subsection 1(b):

> Where a court of appeals . . . has decided an important state . . . question in a way in conflict with applicable state . . . law . . .

Reliance claims (Pet. p. 11) that the Court of Appeals decided this case contrary to statutory and decisional law of Oklahoma. Reliance never cites any statute or decision from Oklahoma which is controlling. Considering the partial validity question, the Court of Appeals said:

4. *Id.* at 492.

> This is a matter of first impression in Oklahoma, and we are inclined to give great deference to the opinion of the resident federal district judge concerning that state's law. . . . In this case we have not been cited to any decision in point.[5]

Considering the oral contract for a payment bond question, the Court of Appeals said:

> Reliance has failed to show any basis upon which we could conclude the trial court was erroneous in holding there had been sufficient performance by DeBoer to take the contract out of the Statute.
>
> . . . Reliance offers no explanation and (sic) citation of authority.
>
> . . . Considering the apparent lack of controlling authority, we believe we should follow our established policy of deferring to the judgment of the resident district judge. (citations omitted)[6]

In its Petition, Reliance analogizes to other Oklahoma decisions and statutes, reasoning therefrom as to what it believes should be the law of Oklahoma. In this Brief, DeBoer follows the same pattern of legal analysis, though arriving at the same conclusion reached by the Court of Appeals. The well-reasoned opinion of the Court of Appeals and the decision of the resident federal district judge both reached a conclusion that was not inconsistent with existing Oklahoma law. This was their responsibility under *Erie*.[7]

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5. *Id.* at 492-3.

6. *Id.* at 494-5; accord: *Bishop* v. *Woods*, ..... U.S. ....., 96 S.Ct. 2074 (1976).

7. *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938).



This Court has held that questions of local law should be determined by the judges of the local courts and that only in exceptional cases will this Court review such a determination.[8]

The Petition does not state important legal questions for the surety industry or for the state of Oklahoma (Pet. pp. 11-12). Reliance claims the entire marketing system of the commercial surety industry and all persons utilizing powers of attorney will be radically affected by this decision. This claim deliberately ignores the plain language of the opinion. The Court of Appeals said that a power of attorney has long been considered an effective means of bringing limitations on authority to a third person's attention; and, any holding of the trial court making powers of attorney ineffective as limitations on bonding agents was not proper or desirable.[9] The Court of Appeals clearly restricted its ruling on the question of partial validity to the unique facts of this case:

> "We are not saying the rule of partial validity should apply in all cases involving fraudulent contracts by an agent where the only power exceeded is the limitation on the amount[10]."

If the opinion of the Court of Appeals has the effect upon Reliance of modifying its practices of selecting and supervising its agents so that greater concern for the public is shown, then that would surely be a salutary result. Reliance cannot seriously urge that it will be detrimental to anyone's business to forego furnishing powers of attor-

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8. Though clearly distinguishable, *see*, *Busby* v. *Electric Utilities Employees Union*, 323 U.S. 72 (1944); *and see*, *Cort* v. *Ash*, 422 U.S. 66 (1975).

9. 540 F.2d 486 at 491 n.2.

10. *Id.* at 494.

ney to persons clearly not qualified to receive them. If the questions herein are important to the surety industry, then certainly that industry would have filed briefs *amicus curiae*.

**A Writ of Certiorari Should Not Be Granted for the Sole Purpose of Certifying Questions of Law to the Supreme Court of the State of Oklahoma**

Reliance asserts that this Court should grant a Writ of Certiorari solely to certify the *undetermined questions of Oklahoma law* to the Supreme Court of the State of Oklahoma for its determination pursuant to the Uniform Certification of Questions of Law Act.[11] This assertion is obviously inconsistent with Reliance's claim that the Court of Appeals misapplied *existing Oklahoma law*.

This Act is to be utilized only where it appears that there is no controlling precedent in the decisions of the Supreme Court of the State of Oklahoma.[12] When Reliance contends this Act is applicable, it concedes there was no misapplication of Oklahoma law by the Court of Appeals. Having conceded this, there is no basis for granting a Writ of Certiorari.

Prior to the Petition, Reliance never sought a certification of questions of law to the Oklahoma Supreme Court. Now, as a last-ditch effort, Reliance seeks to change forums in the hope that the Oklahoma Supreme Court will give it the result it has been unable to obtain from three adverse adjudications in the federal courts.

Reliance is guilty of laches by never previously seeking certification of questions of law. This litigation com-

11. 20 Okla. Stat. § 1601, *et seq.* [Pet. Appendix D, pp. xxii-xxiv.]

12. *Id.* § 1602.



menced in 1971. The Uniform Certification of Questions of Law Act was effective in Oklahoma on July 1, 1973. The judgment in this case was rendered in May, 1974, though trial took place in March, 1974. Argument and submission of this case to the Court of Appeals was on November 13, 1975. Reliance's Petition for Rehearing and Suggestion That the Court Conduct a Rehearing En Banc were filed in September, 1976. Reliance never raised the certification question, though it had an apparent right to do so upon motion.[13] Research fails to disclose any decisions considering this or similar acts which have discussed the question of laches.[14] It is, however, well established in this Court that questions not raised at the trial court or in the Court of Appeals will not be considered by this Court.[15] If any questions would be certified to the Supreme Court of the State of Oklahoma, the threshold questions certified would have to be whether or not Reliance is guilty of laches and whether, under that circumstance, the Oklahoma Supreme Court should exercise its discretion, to answer any certified questions.[16]

The reasonable use of the Act requires that it be applied with restraint, only in those instances where substantial and significant questions need be determined, and only then if such does not result in unnecessary delay

13. *Id.* § 1603.

14. See the concurring opinion of Mr. Justice Rehnquist in *Lehman Brothers* v. *Schein*, 416 U.S. 386 (1974), which touches upon the question, though it was not considered in the Court's opinion.

15. *Cort* v. *Ash*, 422 U.S. 66 (1975); *Adickes* v. *S. H. Kress and Co.*, 398 U.S. 144 (1970).

16. 20 Okla. § 1602.

of the litigation.[17] The Act also requires that all relevant facts to fully show the nature of the controversy in which the questions arose be furnished to the Oklahoma Supreme Court with the certified questions.[18] Given the facts and Record of this case, this would be extremely difficult, if not impossible. The application of the Act would result in a retrial of the entire case to the Oklahoma Supreme Court. Certified questions from the United States Court of Appeals to this Court, sent under analogous law, have been refused when the certification in effect would be to decide the case and not to answer questions of law.[19]

**The Court of Appeals Properly Applied the Partial Validity Exception Doctrine to the Unique Facts of This Case**

Reliance claims the Court of Appeals decision concerning the partial validity exception doctrine was contrary to Oklahoma law. The initial three pages of Reliance's argument on this point (Pet. pp. 13-15) states why Reliance believes the Court of Appeals was correct in holding that Winfrey did not have apparent authority to execute the $925,000 Seven Oaks performance bond. Reliance has conceded that Winfrey had apparent authority to execute bonds up to $500,000 (Pet. p. 21), so its apparent authority argument is not relevant to the stated issue. If Reliance

17. *England* v. *Louisiana State Bd. of Med. Exam.*, 375 U.S. 411 (1964); *Clay* v. *Sun Insurance Office Ltd.*, 363 U.S. 207 (1960); *Trail Builders Supply Company* v. *Reagan*, 409 F.2d 1059 (5th Cir. 1969); *Motor Vehicle Casualty Co.* v. *Atlantic National Ins. Co.*, 374 F.2d 601 (5th Cir. 1967); *Greer* v. *Associated Indemnity Corp.*, 371 F.2d 29 (5th Cir. 1967); *Hamilton* v. *Maryland Casualty Company*, 368 F.2d 768 (5th Cir. 1966); *Green* v. *American Tobacco Company*, 304 F.2d 70 (5th Cir. 1962); *In Re Elliott*, 446 P.2d 347 (Wash. 1968).

18. 20 Okla. Stat. §§ 1604 & 1605.

19. *Atlas Life Ins. Co.* v. *W. I. Southern, Inc.*, 306 U.S. 563 (1939); *Felsenheld* v. *United States*, 186 U.S. 126 (1902).



is correct as to its version of apparent authority as the basis for partial validity, then there could never be a partial validity exception.

Reliance claims that when dealing with an attorney-in-fact, Oklahoma Statutory law requires an individual to ascertain the attorney's authority (Pet. p. 14). The statute referenced, 25 Okla. Stat. § 13 is misrepresented by Reliance. The statute says nothing with regard to agents or attorneys-in-fact. At best, this argument goes to the non-issue of apparent authority.

Reliance claims that two other cases with almost identical facts have denied the obligee (DeBoer) any relief (Pet. p. 15, n.9). These two cases are supposed to support Reliance's unstated contention that there can never be a partial validity exception. The two cases cited by Reliance have been its only authorities throughout this litigation for the proposition that DeBoer should not be able to recover anything from Reliance. The first, *Stovall* v. *Commonwealth*, 4 S.E. 379 (Va. 1887), dealt with a special agent and not a general agent as was Winfrey in this case. *Stovall, supra*, is not even the law of Virginia anymore as a more recent case has arrived at the same result as the Court of Appeals herein by severing the excess portion of a bond.[20] The second, *Dugan* v. *Champion Coal & Towboat Co.*, 49 S.W. 958 (Ky. App. 1899), is even further from the point. *Dugan* dealt with a special agent who was authorized to do a one-time particular act. The *Dugan* opinion never even considered the question of partial validity.

Turning, finally, to the question of the partial validity exception doctrine, Reliance claims the Court of Appeals is wrong in stating that this is a question of first impres-

20. *Yost* v. *Ramey*, 48 S.E. 862 (Va. 1904).

sion in Oklahoma (Pet. p. 15, n.11). Reliance cites no Oklahoma statutes or cases in support of this claim because there are none. Reliance's claim that this question has been considered by the Oklahoma Supreme Court in factually similar cases is misleading and inaccurate. The only Oklahoma authorities Reliance cites are a statute concerning powers of attorney for real property which is consistent with the Court of Appeals decision[21] and a 1940 decision of the Supreme Court of Oklahoma.[22] The significance of the 1940 decision is best demonstrated by the fact that Reliance did not cite it to the Court of Appeals in 92 pages of Briefs filed with that Court and chooses not to discuss its obviously inapplicable and dissimilar facts with this Court.

The Court of Appeals correctly held that the partial validity exception doctrine is recognized by the American Law Institute in Restatement (Second) of Agency § 164(2) (1958)[23] and that it is accepted and supported by numerous authorities, citing *Walker* v. *Peake*, 153 S.C. 257, 150 S.E. 756 (1929), and *Lachmiller* v. *Lachmiller Engineering Corporation*, 144 Cal. App. 2d 533, 301 P.2d 288 (1956).[24] *Lachmiller* turned upon a specific California statute which codifies the common law as expressed by *Walker*, the Court of Appeals herein and 3 Am. Jur. 2d *Agency* § 269, p. 633.

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21. 60 Okla. Stat. § 236.

22. *Home Owners Loan Corp.* v. *Thornburgh*, 106 P.2d 511 (Okla. 1940).

23. 540 F.2d 486 at 493.

24. Accord: *Pogue* v. *Bank of Lake Village*, 464 S.W.2d 49 (Ark. 1971). *See also, Guaranty Trust Co. of New York* v. *Koehler*, 195 F. 669 (C.C.A. 8th Cir. 1912); *Wynn* v. *Hoffman*, 82 So. 32 (Ala. 1919); *Drumright* v. *Philpot*, 60 Am. Dec. 738 (Ga. 1854); *Reed* v. *Seymour*, 24 Minn. 273 (1877); *Wilson* v. *Beardsley*, 30 N.W. 529 (Neb. 1886); *Yost* v. *Ramey*, 48 S.E. 862 (Va. 1904); *Jesup* v. *City Bank of Racine*, 5 N.W. 45 (Wis. 1861).



Oklahoma has two statutes which are consistent with the Court of Appeals reasoning. 15 Okla. Stat. § 105 relates to contracts generally and permits severability when at least one part of a contract is lawful and the balance unlawful. 60 Okla. Stat. § 236 (1971), deals with powers of attorney and the disposition of real property and specifically provides that a disposition is valid to the extent of the power and not wholly void. This latter statute was cited by the Court of Appeals in its analysis.[25] Referring to this same statute, Reliance states: "Had the Oklahoma Legislature intended the rule to apply to other situations it would have adopted similar statutes. It didn't." (Pet. p. 17, n.13). Reliance apparently contends that Oklahoma's adoption of a statute endorsing partial validity in one area of law expresses its intent to exclude it in all other areas. No authority is cited to support this curious contention.

Reliance claims that DeBoer did not manifest a willingness to accept the authorized portion of the bond since it did not contact Reliance in Philadelphia until four and one-half months after the bond was issued (Pet. p. 20). DeBoer did not contact Reliance in Philadelphia until Bruce Dev. defaulted on its contract in July, 1970. Reliance denied any liability in August, 1970, before Seven Oaks construction was even one-half completed. When DeBoer realized it could not complete Bruce Dev.'s contract for $925,000, DeBoer wrote a demand letter to Reliance. Reliance never answered that letter. Reliance now claims DeBoer never manifested its willingness to accept a bond with a penal amount of $500,000, or less. When Reliance refused to even respond to a demand letter, DeBoer filed suit. In its initial Complaint, in 1971, DeBoer set forth its willingness to accept a bond of $500,000, as an alterna-

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25. 540 F.2d 486 at 493.

tive theory of recovery, and has continued to assert that position throughout the litigation.

Restatement (Second) of Agency § 164(2) declines to state a rule where the agent is defrauding the principal as well as the third party. Stating this, the Court of Appeals then turned to the Comments and Notes accompanying the Restatement section to discern what law should reasonably be applied, noted the doctrine is intended to be equitable in nature, and concluded under the facts of this case:

> . . . One purpose of this rule is to prevent fraud by the agent. We do not believe, however, that the rule permitting partial validity is necessarily at odds with the rule designed to prevent fraud. Holding the principal liable to the extent he has given authority would not diminish the incentive of those dealing with an agent to ascertain his authority. They would still be subject to loss when the agent fraudulently exceeds his authority.

*We see no inherent justice in holding the principal for the entire loss when his agent commits fraud within his authority and in allowing him to escape liability entirely when his agent exceeds his authority.* The rule of partial validity could have a salutary effect in preventing the type of conduct involved in this case. *Reliance set the dollar limit on Winfrey's authority at a level it felt was an acceptable risk, considering the potential loss compared to the chances its agent would be unfaithful.* Thinking itself adequately protected from financial loss, *Reliance ignored its duty to supervise its agent and protect the public from loss should Winfrey execute a fraudulent contract in excess of his authority. Dividing the responsibility in the event of loss could encourage both parties to*



*exercise greater prudence than they did in this case.* 540 F.2d 486, 493 (Emphasis supplied).

The absence of "inherent justice" is best demonstrated by Reliance's claim made to the trial court that if one of its agents affixed a $100,000 power of attorney to a $101,000 performance bond, Reliance would have the right to avoid any liability at its option. Reliance creates powers of attorney to sell bonds and seeks a rule of law which gives it a fielder's choice when one of its poorly selected and ill supervised agents commits fraud. Reliance set the dollar limit at an acceptable risk level to it when issuing the so-called blank check to Winfrey. Their regional manager, Stafford, explained that these blank checks were limited sometimes to keep down Reliance's exposure. He and other Reliance witnesses explained that they did not spend the money to supervise their agents because they felt the risk of loss was less than the cost of supervision. Having made that conscious decision to accept the "potential loss compared to the chances its agents would be unfaithful,"[26] Reliance should now be required to accept the loss.

**The Court of Appeals Properly Determined That Respondent Was Entitled to Judgment Based Upon the Oral Promise to Execute a Payment Bond**

The threshold question to this issue is whether or not the oral promise to execute a payment bond falls within the Statute of Frauds. The Court of Appeals assumed, without deciding, that the promise did fall within the Statute and excepted the promise from the Statute based upon DeBoer's performance.[27] Though DeBoer con-

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26. *Id.*

27. *Id.* at 494.

tends the promise is not within the Statute, extensively briefing this contention in the Court of Appeals, it serves no purpose to recite those authorities herein. The only issue here is whether the Court of Appeals correctly excepted the promise from the Statute. Reliance presented no basis to the Court of Appeals to conclude the trial court was erroneous in holding that there had been sufficient performance. Reliance claimed that there was no full or partial performance, but offered no explanation as to why and cited no authorities.[28]

Reliance concedes that in Oklahoma a "fully executed" promise to answer for the debt, default or miscarriage of another is not invalid (Pet. p. 25). DeBoer paid the full premium for both bonds, and Reliance has never suggested anything that DeBoer did not do. Authorities generally, and from Oklahoma, state that partial performance will remove the promise involved from the Statute of Frauds.[29] The only performance which DeBoer could accomplish for this particular contract was to pay the premium, which it did. The only performance not accomplished by anyone was Winfrey's failure to deliver the form to DeBoer. If that is the type of performance Reliance claims would be necessary to except the promise from the Statute, Reliance's claim is ridiculous because the promise would never be under the Statute in the first place.

Reliance's claim that there was no assurance as to what company would provide the bond is a distortion of surety industry practices and the uncontradicted evi-

28. *Id.*

29. *Id.* at 494, 495 and authorities cited therein with particular note to nn.6&7; and *see, Gibson* v. *Dunham*, 346 P.2d 327, 328 (Okla. 1959); *Lindley* v. *Kelly*, 147 P. 1015 (Okla. 1914); *Ganas* v. *Tselos*, 157 Okla. 107, 11 P.2d 751 (Okla. 1932).



dence. A payment bond is a necessary ancillary to a performance bond. The premium paid for a performance bond automatically includes the furnishing of a payment bond. The coverages in fact are duplicitous since the payment bond is a guarantee for suppliers and subcontractors and naturally covers the same dollar costs involved in the performance of the underlying contract. Payment bonds are normally issued with performance bonds and in the same company as the performance bond. Reliance never presented a single instance where a performance bond was issued by one surety company and a payment bond by another.

**If Certiorari Is Granted, This Respondent Is Entitled to Have Its Judgment Affirmed Upon Grounds Not Relied Upon by the Court of Appeals**

The Petition correctly states that the trial court ruled in DeBoer's favor on a number of legal theories. Some of these were considered by the Court of Appeals. If this Court should grant a Writ of Certiorari and either of the two principal issues are decided adversely to DeBoer by this Court, or by the Oklahoma Supreme Court upon certification, then these other legal theories will again be significant. A holding that the partial validity exception doctrine is inapplicable requires DeBoer to look to a different legal theory for recovery. If the judgment upon the payment bond is set aside, then DeBoer's total damages (the amount of the judgment under the performance bond plus the amount under the payment bond) will exceed $500,000, and again DeBoer is required to look to a different legal theory for full recovery.

No purpose is served by presenting detailed factual and legal analysis supporting DeBoer's alternative theories which are listed here simply to acquaint the Court with

the fact that some or all of these theories may be presented to the Court.

Theories which the Court of Appeals considered and decided adversely to DeBoer's position include the questions of negligence and/or constructive notice regarding DeBoer's employees, whether Winfrey had apparent authority to issue the bonds, whether the doctrine of estoppel should preclude Reliance from asserting the lack of apparent authority, and whether Reliance was responsible under agency law for the fraud of Winfrey. The Court of Appeals considered, but only summarily, the additional theories of waiver and ratification. Some, but not all, of the facts supporting these theories have been presented in other issues herein.

Those theories decided in DeBoer's favor by the trial court and not ruled upon by the Court of Appeals include the questions of gross negligence of Reliance, whether DeBoer's contributory negligence is a defense to that gross negligence, whether Winfrey had actual authority to issue the bonds based upon Reliance's relationship with Insurance Center, whether Reliance had a contractual duty to supervise Winfrey pursuant to regulations and applications of the Insurance Commissioner of the State of Oklahoma, whether an oral contract for a performance bond was enforceable, and whether the performance bond and power of attorney should be reformed to accurately reflect the agreement of the parties. Again, some, but not all, of the facts supporting these theories have been presented in other issues herein.



## CONCLUSION

Based upon the reasons stated above, Respondent respectfully prays that this Court deny the Petition so that Respondent can finally collect its damages which were incurred nearly seven years ago.

Respectfully submitted,

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Supreme Court, U. S.
FILED
DEC 13 1976
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In the

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

## No. 76-608

RELIANCE INSURANCE COMPANY,
*Petitioner,*

VERSUS

DEBOER CONSTRUCTION, INC. and
THE INSURANCE CENTER, INC.,
*Respondents.*

## REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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UTTERBACK TYPESETTING CO. 519 W. CALIF., OKLAHOMA CITY PH. 235-0030

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In the
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DEBOER CONSTRUCTION, INC. and
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**REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

As in the petition and for the purpose of clarity, petitioner Reliance Insurance Company will be referred to as "Reliance," respondent DeBoer Construction, Inc. will be referred to as "DeBoer," and respondent The Insurance Center, Inc. will be referred to as "Insurance Center."

## REPLY TO OPPOSITION BRIEF OF DeBOER

DeBoer advances several reasons why this Court should not grant certiorari for the purpose of reviewing this case, with or without certifying to the Supreme Court of Oklahoma for answer the pivotal legal questions which

the Court of Appeals determined were ones of first impression in Oklahoma.

First, DeBoer asserts that because the questions were ones of first impression the decision of the Court of Appeals was not in conflict with applicable Oklahoma law. The fallacy of this contention lies in the fact that the decision of the Court of Appeals was based upon "exceptions" to general rules or principles of law which have never been adopted by the Supreme Court of Oklahoma. Had the Court of Appeals followed to the letter the applicable statutes and existing case law its decision would have been favorable to Reliance, not DeBoer. However, the adoption and improper application of exceptions resulted in a decision in favor of DeBoer. The application of exceptions not previously adopted by the Oklahoma courts would certainly appear to be a departure from existing law.

Secondly, DeBoer argues that the questions are not sufficiently important to the Oklahoma or national surety industry because the Court of Appeals, *by footnote* (540 F.2d 491, fn. 2; Appendix A, p. vi, fn. 2), stated that powers of attorney are still:

> ". . . an effective means of bringing limitations on authority to the third person's attention and defeating his right to rely on other evidence of authority. . . ."

Although the Court of Appeals also held (a) that DeBoer was negligent in failing to read the power of attorney[1] and was not excused under the circumstances from doing so;[2]

[1] 540 F.2d 492; Petitioner's Appendix A, p. vii.

[2] 540 F.2d 491; Petitioner's Appendix A, pp. v-vi.



(b) that Reliance "cannot be liable on the contract [bond] made by Winfrey" and "cannot be liable for his fraud";[3] (c) that DeBoer was under "a duty to exercise reasonable care to ascertain the authority of an agent";[4] and (d) that had DeBoer officers "discovered Winfrey's lack of authority, they would have been bound to inquire of his principal,"[5] the effect of the decision is to impose liability upon Reliance because DeBoer was negligent in not reading the power of attorney which clearly reflected that Winfrey was without authority to issue the bond! In short, the Court of Appeals held that because DeBoer was negligent it was no longer under a duty to inquire. This holding has the effect of rendering powers of attorney an ineffective, not effective, means of bringing limitations on authority to the attention of third parties.

Moreover, the Court of Appeals held valid a verbal promise of a payment bond contrary to the clear terms of the Oklahoma Statute of Frauds.[6] Again, an exception never adopted by the Oklahoma courts was employed in reaching the result.

These questions are vitally important to the surety industry and others which employ the use of powers of attorney because if the Court of Appeals decision is permitted to stand a "third person" could effectively relieve himself of the duty to inquire simply by claiming, rightly or wrongly, that he neglected to read the power of attor-

[3] 540 F.2d 491; Petitioner's Appendix A, p. vi.

[4] 540 F.2d 492; Petitioner's Appendix A, p. vii.

[5] 540 F.2d 491; Petitioner's Appendix A, p. vii.

[6] Title 15, Okla. Stat., § 136 (1971), p. 1376, Vol. 1.

ney and was thus blissfully unaware of the authority limitations. Stated differently, the third party need only testify that he knew a power of attorney existed and assumed that it expressed unlimited authority.

Under such circumstances, commercial sureties and others similarly situated would have no effective means of protecting themselves from liability created by unauthorized contracts short of refusing to use powers of attorney in their business dealings.[7] Construction bonds are normally issued with a penal amount equal to the contract price. The fraudulent bond involved in this case was so written—the penal amount was $925,000, far in excess of the limits set forth in the power. The lower court decision has the effect of permitting the third party (DeBoer) to completely ignore this fact and assume that upon subsequent litigation a court will, in substance, reform the penal amount of the bond to conform with whatever "apparent authority" may have existed had the penal amount been within the scope of the power and had the power been read and relied upon to the third party's detriment.[8]

Such a rule would leave sureties helpless. Although the risk of loss attendant to a construction contract bond

[7] The Court of Appeals attempts to limit the application of its decision to the "facts of this case and the context in which it arises," but does not distinguish the different situations to which it refers when stating that the rule of partial validity should not apply "in all cases involving fraudulent contracts by an agent where the only power exceeded is a limitation on the amount." 540 F 2d 494; Petitioner's Appendix A, pp. xi-xii.

[8] As pointed out in the petition, under Oklahoma law "apparent" authority is created by representations of the principal (such as may be set forth in powers) which come to the knowledge of and are relied upon in good faith by the third party. DeBoer did not read or rely upon any representations made by Reliance.



is measured primarily by the amount and type of contract, coupled with the ability and financial integrity of the contractor/principal, under the Court of Appeals decision a *dishonest* or *negligent* attorney in fact could issue a valid bond in the penal amount of $2,000,000 covering a $2,000,000 contract even though his power of attorney limited him to issuing bonds with penal amounts of $100,000 or less. *The point is that the language in the power to the effect that the attorney in fact is limited to issuing bonds with certain penal amounts is rendered meaningless since a court would be at liberty to reduce the actual penal amount by reformation regardless of the size of the contract or the risks attendant thereto.*

Under the doctrine adopted by the Court of Appeals, a surety or other person prior to issuing a power of attorney would be faced with the question: How may I protect myself from either dishonest or negligent[9] use of a power of attorney if I cannot rely upon the third party being bound by the *penal amount* or other limitations described in the power? The only answer under the Court of Appeals decision is that one cannot protect himself from unauthorized liability.

It is respectfully submitted that the issues are of sufficient importance to justify the attention of this Court.

DeBoer next asserts that certiorari should not be granted for the purpose of certifying for answer to the Supreme Court of Oklahoma legal questions which the

[9] If a surety or anyone else believed a person would use a power dishonestly, then obviously one would not be issued. Limitations are to protect against negligent as well as intentional abuse of authority.

Court of Appeals deemed ones of first impression under Oklahoma law.

Neither in the trial court nor at the Court of Appeals level did Reliance believe that the case involved *legal questions* of first impression under Oklahoma law. It was not until the Court of Appeals rejected the five basic theories[10] of liability employed by the trial court in favor of two *alternative theories*[11] that Reliance had any inclination that the case would be decided upon what the Court of Appeals determined to be questions of first impression. By this time Reliance's only procedural remedy was to petition for rehearing,[12] which it did. Until such time as the Court of Appeals disposed of unsupported fact findings[13] and rejected the basic liability theories (conclusions of law) in favor of Reliance, the case simply was not in a position for certifying questions of law. Certainly there was no compelling reason to certify legal questions concerning *alternative theories* which were not implemented by the trial court.[14] Thus, the contention by DeBoer that Reliance

[10]The theories were: apparent authority to issue a $925,000 bond, fraud, negligence, estoppel and waiver and ratification.

[11]The "partial validity" doctrine and the oral payment bond concept.

[12]Rule 40, Rules of Appellate Procedure.

[13]The trial court made 250 findings of fact and 42 conclusions of law virtually verbatim from those proposed by DeBoer. The Court of Appeals disapproved this "complicated" practice. 540 F.2d 490. Petitioner's Appendix A, pp. iii-iv. Of course, the extensive findings and conclusions made it very difficult to get "on target" with the legal issues, and required Reliance to devote much of its limited briefing space to inapplicable theories.

[14]The judgment of the trial court held Reliance liable under the fraudulent bond for the fulll amount of DeBoer's loss up to $925,000, the penal amount of the bond. The alternative theories were not actually used until the Court of Appeals rejected the principal theories.



should be held guilty of laches for not having requested certification sooner seems totally without merit or reason.

Admittedly, Reliance seeks certification as an alternative to this Court reversing on its own the decision of the Court of Appeals. This is the objective of any appeal or petition for writ of certiorari and is the right of every litigant.

Since *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), federal courts have been faced with the problem of ascertaining state law when the state judiciary has not spoken definitively on the matter. Often federal courts were forced to venture guesses, such as was done in this case. To avoid the situation federal courts have developed an abstension doctrine under which they refrain from acting while the litigants seek a statement of law from state courts.[15] The Uniform Certification of Questions of Law Act[16] was created as a suitable technique to assist federal courts in ascertaining state law—particularly questions of first impression. One of the first states to provide for certification was Florida,[17] and the device has been used with some frequence.[18] Likewise, the Supreme Court of Oklahoma has used its power and jurisdiction to answer

[15]*Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941); 1A Moore's Federal Practice, par. 0.203.

[16]Oklahoma adopted the Act as Title 20, Okla. Stat., §§ 1601-1613 (1973); Petitioner's Appendix D, pp. xxii-xxiv.

[17]Fla.Stat.Ann., Sec. 25.031. Formerly Fla. Appellate Rule 4.61 was used.

[18]See, for example, *Sun Insurance* v. *Clay*, 133 F.2d 735 (5 Cir. 1961); *Green* v. *American Tobacco Co.*, 304 F.2d 70 (5 Cir. 1962), certified question answered 154 So.2d 169, conformed to in 325 F.2d 673 (1963), *cert. den.* 377 U.S. 943 (1964), 84 S.Ct. 1197, 12 L.Ed.2d 229; *Hopkins* v. *Lockheed Aircraft Corp.*, 358 F.2d 347 (5 Cir. 1966), and *Life Ins. Co. of Va.* v. *Shifflet*, 370 F.2d 555 (5 Cir. 1967).

certified questions.[19] Very recently the Fifth Circuit certified a question to the Supreme Court of Alabama concerning performance bonds and the Statute of Frauds, having considered the issue of significant importance to writers of surety bonds in Alabama and the obligees thereunder.[20] This Court has on several occasions certified questions to the highest court of Florida.[21] One such certification was made on the court's own motion[22] because there appeared to be no clear controlling precedents in the decisions of the courts of Florida.

Moreover, this Court seemingly urged the use of the certified question procedure by the circuit courts in *Clay* v. *Sun Insurance*, 363 U.S. 207, 212, 80 S.Ct. 1222, 4 L.Ed.2d 1170 (1960).

Now that the Court of Appeals, based upon settled Oklahoma law, has eliminated all of the legal theories except the two which it has determined to be ones of first impression for Oklahoma, certification would appear appropriate for the first time in these proceedings.

This Court should either grant certiorari and decide the questions or certify them for answer to the Oklahoma Supreme Court or, possibly, direct that the Tenth Circuit Court certify the questions.

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[19] *Travis* v. *Del State Bank*, 553 P.2d 486 (Okl. 1976); *Singh* v. *Cities Service Oil Co.*, 554 P.2d 1367 (Okl. 1976).

[20] *Cincinnati Ins. Co.* v. *City of Talladega*, 529 F.2d 718 (5 Cir. 1976).

[21] *Dresner* v. *City of Tallahassee*, 375 U.S. 136, 84 S.Ct. 235, 11 L.Ed.2d 208 (1963); *Aldrich* v. *Aldrich*, 375 U.S. 75, 84 S.Ct. 184 (1963). same case, 84 S.Ct. 305 (1963).

[22] *Aldrich* v. *Aldrich*, fn. 21.



The remaining portions of the opposition brief are devoted to arguments concerning whether or not the Court of Appeals properly interpreted Oklahoma law or accurately predicted what the Supreme Court of Oklahoma might have to say were the questions presented to it for answer. The original petition for writ of certiorari accurately explains the contentions of Reliance and adequately anticipates arguments of DeBoer. Although DeBoer accuses Reliance of misrepresenting some of the facts and law, a careful study of the petition will reveal that no such misrepresentations were either intended or made. The Court of Appeals decision substantially recites the relevant facts and the law upon which its opinion was based.

## REPLY TO OPPOSITION BRIEF OF INSURANCE CENTER

Insurance Center, in the apparent "heat of battle," states (pp. 2-3 of its opposition brief) that Reliance has misstated the facts by not informing the Court that no responsible person with Insurance Center authorized issuance of the fraudulent bonds or knew of their existence or received any benefit therefrom. Perhaps counsel merely overlooked the statements on page 7 of the petition to the effect that the culprit, Winfrey, never sought authority to issue the bonds, never reported them to either Reliance or Insurance Center and never collected or paid any premiums to either Reliance or Insurance Center (Winfrey took a "payoff," not premiums, from Bruce, not DeBoer). No misstatements were either made or intended. The facts were that no one except Winfrey and Bruce had *actual* knowl-

edge of the bogus bonds until many months later when the defaults occurred.

The basic error, as stated in the petition, is that the trial court failed to make appropriate findings to sustain the judgment over for indemnity against Insurance Center, although proposed ones were submitted. The Court of Appeals then misconstrued both the evidence and the law in reversing the judgment over, with the anomalous result that officers of a corporate agency are responsible for their abuse of authority, yet the corporate agency employer is not so responsible even though it was the one with the "agency agreement" and the one, pursuant to that agreement, which requested that powers of attorney be issued to its officers so they might conduct agency business on behalf of the carrier! Insurance Center was Reliance's agent regardless of the fact that Winfrey may have been a "special agent" under and pursuant to the power of attorney. Insurance Center, a corporation, acted through its officers. The agency agreement contemplates that powers will be issued to agency officers and other employees. The agency agreement *does not* contemplate that the corporate agency (Insurance Center) will be relieved of its responsibility and liability simply because powers are issued directly to agency employees.



## CONCLUSION

This case presents a classic example of a situation which should result in certifying questions of law to the highest court of a state so that it might properly determine unresolved questions of state law. The statutory authority in Oklahoma is new, yet the Oklahoma Supreme Court has not hesitated to answer questions of even less importance.

Prior to the opinion of the Court of Appeals, the case simply was not in a posture for question certification because there were numerous unsupported factual findings and legal conclusions made by the trial court which could have been and were decided based upon settled Oklahoma law. Once the decision was rendered, Reliance's only procedural remedy was to petition for rehearing on the *alternative* theories which the Circuit Court determined to be ones of first impression under Oklahoma law.

It is respectfully submitted that this Court should grant the writ and either (1) certify the first impression questions to the Supreme Court of Oklahoma for answer, (2) remand the case to the Tenth Circuit so that it might certify the questions or (3) hear and decide the legal questions upon their merits.

Respectfully submitted,

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December, 1976

**CERTIFICATE OF SERVICE**

I hereby certify that the following named parties,

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required by law to be served in this case, were this day mailed three copies of the foregoing Reply Brief of Petitioner in Support of Petition for Writ of Certiorari, postage prepaid.

Dated: December 19, 1976.

John B. Hayes

John B. Hayes